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INTERNATIONAL STANDBY PRACTICES (ISP98)

Report of the Secretary-General

1. By letter of 3 March 1999 (reproduced in annex I), the Director of the Institute of International Banking Law and Practice, Inc. requested the Commission to consider endorsing for world-wide use the new Rules on International Standby Practices (ISP98). The original text of ISP98, in English or French, is contained in annex IV. Translations into other languages are currently being prepared by the International Chamber of Commerce (ICC), which has endorsed the text and issued it as ICC publication No. 590.

2. As stated on the cover of that publication,

> "ISP98 fills an important gap in the market place. Though standby letters of credit have similarities with commercial letters of credit and other financial instruments, there are significant differences in scope and practice. Moreover, it is recognized that the ICC's Uniform Customs and Practice for Documentary Credits (UCP), which is internationally accepted for commercial letters of credit, is not appropriate for all forms of standbys. A new set of Rules was required for this workhorse of commerce and finance, which, in terms of value, exceeds commercial credits by a ratio of 5:1.
>
> ISP98 reflects a distillation of practices from a wide range of standby users - bankers, merchants, rating agencies, corporate treasurers, credit managers, government officials and banking regulators. Like the UCP for commercial credits, ISP98 is destined to become the standard for the use of standbys in international transactions."

3. By way of general background, it may be noted that the subject of documentary credits and bank guarantees has been a topic in which the Commission has taken an interest since the time of its inception. The Commission endorsed the 1962 version of the Uniform Customs and Practice for

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Documentary Credits (UCP) at its second session, the 1974 version at its eighth session, the 1983 version at its seventeenth session and the 1993 version at its twenty-seventh session.

4. In view of the close link between ISP98 and the 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, the Secretary of the Commission participated in the preparation of ISP98 so as to ensure consistency between these two supplementary texts. His prologue to the ICC publication is reproduced in annex III. Additional information on the reasons for the preparation of ISP98 and about its salient features may be deduced from the preface contained in annex II.

ANNEX I

Letter of Professor James E. Byrne, Director of the
Institute of International Banking Law and Practice, Inc

I am writing to request endorsement of the International Standby Practices (ISP98) by the United Nations Commission on International Trade Law.

These private rules of practice are intended to apply to standby letters of credit. The idea to prepare such rules was conceived during the deliberations of the UNCITRAL Working Group on International Contract Practices which resulted in the UN Convention on Independent Guarantees and Standby Letters of Credit. These rules were deliberately formulated to complement the Convention whose use is recommended in their Official Preface. The ISP98 drafting process itself was undertaken in regular consultation with the UNCITRAL Secretariat and the Institute has used occasions to promote ISP98 as an opportunity also to promote adoption of the Convention.

ISP98 became effective 1 January 1999. It has been endorsed by the International Financial Services Association and the ICC Commission on Banking Technique and Practice, and issued as ICC publication No. 590. It is currently being used and promoted by major banks which issue standby letters of credit, and is expected to become the world standard within the next few years.

Because of the close links between ISP98 and the UN Convention, and due to UNCITRAL's past practice of endorsing similar rules of practice, such as UCP500 and INCOTERMs 1990, the Institute formally requests that the Commission consider endorsement of the ISP.

ANNEX II

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Approved by the International Financial Services Association and the ICC Banking Commission

PREFACE

The International Standby Practices (ISP98) reflects generally accepted practice, custom, and usage of standby letters of credit. It provides separate rules for standby letters of credit in the same sense that the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Demand Guarantees (URDG) do for commercial letters of credit and independent bank guarantees.

The formulation of standby letter of credit practices in separate rules evidences the maturity and importance of this financial product. The amounts outstanding of standbys greatly exceed the outstanding amounts of commercial letters of credit. While the standby is associated with the United States where it originated and where it is most widely used, it is truly an international product. Non-U.S. bank outstandings have exceeded those of U.S. banks in the United States alone. Moreover, the standby is used increasingly throughout the world.

Standbys are issued to support payment, when due or after default, of obligations based on money loaned or advanced, or upon the occurrence or non-occurrence of another contingency.

For convenience, standbys are commonly classified descriptively (and without operative significance in the application of these Rules) based on their function in the underlying transaction or other factors not necessarily related to the terms and conditions of the standby itself. For example:

A "Performance Standby" supports an obligation to perform other than to pay money, including for the purpose of covering losses arising from a default of the applicant in completion of the underlying transactions.

An "Advance Payment Standby" supports an obligation to account for an advance payment made by the beneficiary to the applicant.

A "Bid Bond/Tender Bond Standby" supports an obligation of the applicant to execute a contract if the applicant is awarded a bid.

A "Counter Standby" supports the issuance of a separate standby or other undertaking by the beneficiary of the counter standby.

A "Financial Standby" supports an obligation to pay money, including any instrument evidencing an obligation to repay borrowed money.

A "Direct Pay" Standby supports payment when due of an underlying payment obligation typically in connection with a financial standby without regard to a default.

An "Insurance Standby" supports an insurance or reinsurance obligation of the applicant.

A "Commercial Standby" supports the obligations of an applicant to pay for goods or services in the event of non-payment by other methods.

In the past, many standbys have been issued subject to the UCP even though it was intended for commercial letters of credit. The UCP reinforced the independence and documentary character of the standby. It also provided standards for examination and notice of dishonor and a basis to resist market pressures to embrace troublesome practices such as the issuance of standbys without expiration dates.

Despite these important contributions, it has long been apparent that the UCP was not fully applicable nor appropriate for standbys, as is recognized in UCP 500 Article 1 which provides that it applies "to the extent to which they may be applicable." Even the least complex standbys (those calling for presentation of a draft only) pose problems not addressed by the UCP. More complex standbys (those involving longer terms or automatic extensions, transfer on demand, requests that the beneficiary issue its own undertaking to another, and the like) require more specialized rules of practice. The ISP fills these needs.

The ISP differs from the UCP in style and approach because it must receive acceptance not only from bankers and merchants, but also from a broader range of those actively involved in standby law and practice---corporate treasurers and credit managers, rating agencies, government agencies and regulators, and indenture trustees as well as their counsel. Because standbys are often intended to be available in the event of disputes or applicant insolvency, their texts are subject to a degree of scrutiny not encountered in the commercial letter of credit context. As a result, the ISP is also written to provide guidance to lawyers and judges in the interpretation of standby practice.

Differences in substance result either from different practices, different problems, or the need for more precision. In addition, the ISP proposes basic definitions should the standby permit or require presentation of documents by electronic means. Since standbys infrequently require presentation of negotiable documents, standby practice is currently more conducive to electronic presentations, and the ISP provides definitions and rules encouraging such presentations. The development of S.W.I.F.T. message types for the ISP is anticipated.

The ISP, like the UCP for commercial letters of credit, simplifies, standardizes, and streamlines the drafting of standbys, and provides clear and widely accepted answers to common problems. There are basic similarities with the UCP because standby and commercial practices are fundamentally the same. Even where the rules overlap, however, the ISP is more precise, stating the intent implied in the UCP rule, in order to make the standby more dependable when a drawing or honor is questioned.

Like the UCP and the URDG, the ISP will apply to any independent undertaking issued subject to it. This approach avoids the impractical and often impossible task of identifying and distinguishing standbys from independent guarantees and, in many cases, commercial letters of

credit. The choice of which set of rules to select is, therefore, left to the parties--as it should be. One may well choose to use the ISP for certain types of standbys, the UCP for others, and the URDG for still others. While the ISP is not intended to be used for dependent undertakings such as accessory guarantees and insurance contracts, it may be useful in some situations in indicating that a particular undertaking which might otherwise be treated as dependent under local law is intended to be independent.

For the ISP to apply to a standby, an undertaking should be made subject to these Rules by including language such as (but not limited to):

This undertaking is issued subject to the International Standby Practices 1998.

or

Subject to ISP98.

Although the ISP can be varied by the text of a standby, it provides neutral rules acceptable in the majority of situations and a useful starting point for negotiations in other situations. It will save parties (including banks that issue, confirm, or are beneficiaries of standbys) considerable time and expense in negotiating and drafting standby terms.

The ISP is designed to be compatible with the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (which represents a useful and practical formulation of basic standby and independent guarantee law) and also with local law, whether statutory or judicial, and to embody standby letter of credit practice under that law. If these rules conflict with mandatory law on issues such as assignment of proceeds or transfer by operation of law, applicable law will, of course, control. Nonetheless, most of these issues are rarely addressed by local law and progressive commercial law will often look to the practice as recorded in the ISP for guidance in such situations, especially with respect to cross border undertakings. As a result, it is expected that the ISP will complement local law rather than conflict with it.

The ISP is intended to be used also in arbitration as well as judicial proceedings (such as the expert based letter of credit arbitration system developed by the International Center for Letter of Credit Arbitration (ICLOCA) Rules or general commercial ICC arbitration) or with alternative methods of dispute resolution. Such a choice should be made expressly and with appropriate detail. At a minimum, it can be made in connection with the clause relating to ISP98 - e.g. This undertaking is issued subject to ISP98, and all disputes arising out of it or related to it are subject to arbitration under ICLOCA Rules (1996).

Although translations of the ISP into other languages are envisioned and will be monitored for integrity, the English text is the official text of the ISP in the event of disputes.

The ISP is the product of the work of the ISP Working Group under the auspices of the Institute of International Banking Law & Practice, Inc. which interacted with hundreds of persons over a five year period, and has benefitted from comments received from individuals, banks, and national and international associations. In particular, the participation of the International Financial Services Association (formerly the USCIB) and the Ad Hoc Working Group under the

chairmanship of Gary Collyer (which led to its endorsement by the ICC Banking Commission) is gratefully recognized. In addition, the sponsorship and support of Citibank N.A., The Chase Manhattan Bank, ABN-AMRO, Baker & McKenzie, and the National Law Center for Inter-American Free Trade is acknowledged. Perhaps the greatest significance of the ISP is that its creation marks a new chapter in the collaboration between the international banking operations community and the legal community at an international level. In this respect, the active role played in this process by the Secretariat of the United Nations Commission on International Trade Law has been invaluable.

The ISP is drafted as a set of rules intended for use in daily practice. It is not intended to provide introductory information on standbys and their uses. While it is recognized that specific rules would benefit from explanatory comments, such comments are not appended to the ISP because the resulting work would be too cumbersome for daily use. Instead, introductory materials and Official Comments are available in the *Official Commentary on the International Standby Practices (ISP98)*. For further information on support materials and developments on the ISP and to pose queries, consult the ISP98 website: www.ISP98.com.

To address inevitable questions, to provide for official interpretation of the rules, and to assure their proper evolution, the Institute of International Banking Law & Practice, Inc. has created a Council on International Standby Practices which is representative of the several constituencies which have contributed to the ISP and has charged it with the task of maintaining the integrity of the ISP in cooperation with the Institute, the ICC Banking Commission, the IFSA, and various supporting organizations.

James G. Barnes
Baker & McKenzie
Vice Chair
ISP Working Group

Professor James E. Byrne
Director,
Institute of International Banking
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Chair & Reporter
ISP Working Group

Gary W. Collyer
Chair, ICC Ad Hoc Working Group &
Technical Adviser to the
ICC Banking Commission

ANNEX III

PROLOGUE

by Gerold Herrmann, Secretary, United Nations Commission on International Trade Law (UNCITRAL)

It was an extremely interesting and enriching experience for me to assist in drafting ISP98. This participation allowed me to witness (and now bear witness to) the very thorough and pragmatic drafting process in a superbly selected group, with representatives of all interested sectors actively involved in standby letter of credit practice such as: bankers, especially those responsible for letter of credit operations and global trade transactions, bank counsel, attorneys, academics, regulators, government officials, corporate treasurers, and likely influential beneficiaries. The treasure trove of experience and expertise and the diversity of interests and perspectives proved invaluable in determining--as was continuously done by examining concrete practical examples--whether on a given issue an operational rule would be desirable and useful and, if so, which solution would work best and reflect good practice.

Continued participation in the preparatory work has also convinced me--as, I am sure, it would have anyone else--of the special characteristics of standbys at the operational level of practical detail and usage. Their special features, in my view, not only justify but also necessitate special contractual rules designed for standbys. As the constant comparison with the UCP clearly revealed, quite a few UCP Articles are inappropriate for standbys and quite a few issues of paramount importance in standby practice are not addressed at all in the UCP. While a similar disparity in practice exists between the standby and the independent guarantee (the bank or demand guarantee European style), this seems particularly, if not exclusively, true for those types of actual use (e.g. financial standby, direct-pay standby) hitherto found only extremely rarely in guarantee practice. For this and other reasons, including firmness of the undertaking, I would not be surprised to see not only standbys but also some demand guarantees issued subject to ISP98.

For a professional unifier of law, participation in the preparatory work was particularly satisfying because of its interconnection with other harmonisation and reform efforts. In addition to the concordance with revised Article 5 UCC (the letter-of-credit law of the homeland of the standby) and the similarly close contact (and personal overlap) with the 1993 UCP revision task force, I am referring in particular to UNCITRALs work which culminated in the adoption in 1995 by the General Assembly of the "United Nations Convention on Independent Guarantees and Stand-by Letters of Credit." The idea of preparing special operational rules for standbys was born during the extensive debates comparing national laws as well as the two instruments to be married by that Convention. Since bride and groom were presented there in all facets and critically scrutinized by their future in-laws, UNCITRALs *travaux preparatoires* make for highly informative reading (as will future abstracts of court decisions to be published in UNCITRAL's case collection system called CLOUT; homepage: www.un.or.at/uncitral). It was gratifying to see the group preparing ISP98 refer continuously to the UNCITRAL Convention in order to ensure complete consistency. I must admit to special gratification by overhearing one of the world's leading letter of credit expert's remark to his banking colleague: "The more I look at this UN Convention, the more I really like it."

The above coordination or cooperation in the universal harmonisation and modernization efforts is welcome and in fact crucial because of the (often neglected or ignored) interdependence between the two very different levels of legal norms: the contractual level, where such sets of rules like ISP98, UCP 500, or URDG become effective by agreement of the individual parties, and the statutory level, where internationally elaborated law like the UN Convention or domestic law (e.g. Art. 5 UCC) recognise and give full effect to the exercise of that party autonomy and regulate certain issues that can effectively be settled only at that level (e.g. standards of fraud exception, injunctive relief and other court matters). Therefore, ISP98 and the Convention supplement each other in an ideal manner and together lay the necessary basis for a smooth functioning of standby practice worldwide.

* * *

RULE 1: GENERAL PROVISIONS

SCOPE, APPLICATION, DEFINITIONS, AND INTERPRETATION OF THESE RULES

1.01 Scope and Application

a. These Rules are intended to be applied to standby letters of credit (including performance, financial, and direct pay standby letters of credit).
b. A standby letter of credit or other similar undertaking, however named or described, whether for domestic or international use, may be made subject to these Rules by express reference to them.
c. An undertaking subject to these Rules may expressly modify or exclude their application.
d. An undertaking subject to these Rules is hereinafter referred to as a "standby".

1.02 Relationship to Law and Other Rules

a. These Rules supplement the applicable law to the extent not prohibited by that law.
b. These Rules supersede conflicting provisions in any other rules of practice to which a standby letter of credit is also made subject.

1.03 Interpretative Principles

These Rules shall be interpreted as mercantile usage with regard for:

a. integrity of standbys as reliable and efficient undertakings to pay;
b. practice and terminology of banks and businesses in day-to-day transactions;
c. consistency within the worldwide system of banking operations and commerce; and
d. worldwide uniformity in their interpretation and application.

1.04 Effect of the Rules

Unless the context otherwise requires, or unless expressly modified or excluded, these Rules apply as terms and conditions incorporated into a standby, confirmation, advice, nomination, amendment, transfer, request for issuance, or other agreement of:

i. the issuer;
ii. the beneficiary to the extent it uses the standby;
iii. any advisor;
iv. any confirmer;
v. any person nominated in the standby who acts or agrees to act; and
vi. the applicant who authorises issuance of the standby or otherwise agrees to the application of these Rules.

1.05 Exclusion of Matters Related to Due Issuance and Fraudulent or Abusive Drawing

These Rules do not define or otherwise provide for:

a. power or authority to issue a standby;
b. formal requirements for execution of a standby (e.g. a signed writing); or
c. defenses to honour based on fraud, abuse, or similar matters.

These matters are left to applicable law.

GENERAL PRINCIPLES

1.06 Nature of Standbys

a. A standby is an irrevocable, independent, documentary, and binding undertaking when issued and need not so state.
b. Because a standby is irrevocable, an issuer's obligations under a standby cannot be amended or cancelled by the issuer except as provided in the standby or as consented to by the person against whom the amendment or cancellation is asserted.
c. Because a standby is independent, the enforceability of an issuer's obligations under a standby does not depend on:
   i. the issuer's right or ability to obtain reimbursement from the applicant;
   ii. the beneficiary's right to obtain payment from the applicant;
   iii. a reference in the standby to any reimbursement agreement or underlying transaction; or
   iv. the issuer's knowledge of performance or breach of any reimbursement agreement or underlying transaction.
d. Because a standby is documentary, an issuer's obligations depend on the presentation of documents and an examination of required documents on their face.
e. Because a standby or amendment is binding when issued, it is enforceable against an issuer whether or not the applicant authorised its issuance, the issuer received a fee, or the beneficiary received or relied on the standby or the amendment.

1.07 Independence of the Issuer-Beneficiary Relationship

An issuer's obligations toward the beneficiary are not affected by the issuer's rights and obligations toward the applicant under any applicable agreement, practice, or law.

1.08 Limits to Responsibilities

An issuer is not responsible for:

a. performance or breach of any underlying transaction;
b. accuracy, genuineness, or effect of any document presented under the standby;
c. action or omission of others even if the other person is chosen by the issuer or nominated person; or
d. observance of law or practice other than that chosen in the standby or applicable at the place of issuance.

TERMINOLOGY

1.09 Defined Terms

In addition to the meanings given in standard banking practice and applicable law, the following terms have or include the meanings indicated below:

a. Definitions

"Applicant" is a person who applies for issuance of a standby or for whose account it is issued, and includes (i) a person applying in its own name but for the account of another person or (ii) an issuer acting for its own account.

"Beneficiary" is a named person who is entitled to draw under a standby. See Rule 1.11(c)(ii).

"Business Day" means a day on which the place of business at which the relevant act is to be performed is regularly open; and **"Banking Day"** means a day on which the relevant bank is regularly open at the place at which the relevant act is to be performed.

"Confirmer" is a person who, upon an issuer's nomination to do so, adds to the issuer's undertaking its own undertaking to honour a standby. See Rule 1.11(c)(i).

"Demand" means, depending on the context, either a request to honour a standby or a document that makes such request.

"Document" means a draft, demand, document of title, investment security, invoice, certificate of default, or any other representation of fact, law, right, or opinion, that upon presentation (whether in a paper or electronic medium), is capable of being examined for compliance with the terms and conditions of a standby.

"Drawing" means, depending on the context, either a demand presented or a demand honoured.

"Expiration Date" means the latest day for a complying presentation provided in a standby.

"Person" includes a natural person, partnership, corporation, limited liability company, government agency, bank, trustee, and any other legal or commercial association or entity.

"Presentation" means, depending on the context, either the act of delivering documents for examination under a standby or the documents so delivered.

"Presenter" is a person who makes a presentation as or on behalf of a beneficiary or nominated person.

"Signature" includes any symbol executed or adopted by a person with a present intent to authenticate a document.

b.Cross References

"Amendment" - Rule 2.06
"Advice" - Rule 2.05
"Approximately" (**"About"** or **"Circa"**) - Rule 3.08(f)
"Assignment of Proceeds" - Rule 6.06
"Automatic Amendment" - Rule 2.06(a)
"Copy" - Rule 4.15(d)
"Cover Instructions" - Rule 5.08
"Honour" - Rule 2.01
"Issuer" - Rule 2.01
"Multiple Presentations" - Rule 3.08(b)
"Nominated Person" - Rule 2.04
"Non-documentary Conditions" - Rule 4.11
"Original" - Rule 4.15(b) & (c)
"Partial Drawing" - Rule 3.08(a)
"Standby" - Rule 1.01(d)
"Transfer" - Rule 6.01
"Transferee Beneficiary" - Rule 1.11(c)(ii)
"Transfer by Operation of Law" - Rule 6.11

c. Electronic Presentations

The following terms in a standby providing for or permitting electronic presentation shall have the following meanings unless the context otherwise requires:

"Electronic Record" means:

i. a record (information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form),
ii. communicated by electronic means to a system for receiving, storing, re-transmitting, or otherwise processing information (data, text, images, sounds, codes, computer programs, software, databases, and the like); and
iii. capable of being authenticated and then examined for compliance with the terms and conditions of the standby.

"Authenticate" means to verify an electronic record by generally accepted procedure or methodology in commercial practice:

i. the identity of a sender or source, and
ii. the integrity of or errors in the transmission of information content.

The criteria for assessing the integrity of information in an electronic record is whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage, and display.

"Electronic signature" means letters, characters, numbers, or other symbols in electronic form, attached to or logically associated with an electronic record that are executed or adopted by a party with present intent to authenticate an electronic record.

"Receipt" occurs when:

i. an electronic record enters in a form capable of being processed by the information system designated in the standby, or
ii. an issuer retrieves an electronic record sent to an information system other than that designated by the issuer.

1.10 Redundant or Otherwise Undesirable Terms

a. A standby should not or need not state that it is:

i. **unconditional** or **abstract** (if it does, it signifies merely that payment under it is conditioned solely on presentation of specified documents);
ii. **absolute** (if it does, it signifies merely that it is irrevocable);
iii. **primary** (if it does, it signifies merely that it is the independent obligation of the issuer);
iv. **payable from the issuer's own funds** (if it does, it signifies merely that payment under it does not depend on the availability of applicant funds and is made to satisfy the issuer's own independent obligation);
v. **clean** or **payable on demand** (if it does, it signifies merely that it is payable upon presentation of a written demand or other documents specified in the standby).

b. A standby should not use the term **"and/or"** (if it does it means either or both).
c. The following terms have no single accepted meaning:
   i. and shall be disregarded:
   "callable",
   "divisible",
   "fractionable",
   "indivisible", and
   "transmissible".
   ii. and shall be disregarded unless their context gives them meaning:
   "assignable",
   "evergreen",
   "reinstate", and
   "revolving".

1.11 Interpretation of these Rules

a. These Rules are to be interpreted in the context of applicable standard practice.
b. In these Rules, **"standby letter of credit"** refers to the type of independent undertaking for which these Rules were intended, whereas **"standby"** refers to an undertaking subjected to these Rules.
c. Unless the context otherwise requires:
   i. **"Issuer"** includes a **"confirmer"** as if the confirmer were a separate issuer and its confirmation were a separate standby issued for the account of the issuer;
   ii. **"Beneficiary"** includes a person to whom the named beneficiary has effectively transferred drawing rights (**"transferee beneficiary"**);
   iii. **"Including"** means "including but not limited to";
   iv. "A **or** B" means "A or B or both"; "**either** A **or** B" means "A or B, but not both"; and "A **and** B" means "both A and B";
   v. Words in the singular number include the plural, and in the plural include the singular; and
   vi. Words of the neuter gender include any gender.
d. i. Use of the phrase **"unless a standby otherwise states"** or the like in a rule emphasizes that the text of the standby controls over the rule;
   ii. Absence of such a phrase in other rules does not imply that other rules have priority over the text of the standby;
   iii. Addition of the term **"expressly"** or **"clearly"** to the phrase "unless a standby otherwise states" or the like emphasizes that the rule should be excluded or modified only by wording in the standby that is specific and unambiguous; and
   iv. While the effect of all of these Rules may be varied by the text of the standby, variations of the effect of some of these Rules may disqualify the standby as an independent undertaking under applicable law.
e. The phrase **"stated in the standby"** or the like refers to the actual text of a standby (whether as issued or effectively amended) whereas the phrase **"provided in the standby"** or the like refers to both the text of the standby and these Rules as incorporated.

RULE 2: OBLIGATIONS

2.01 Undertaking to Honour by Issuer and Any Confirmer to Beneficiary

a. An issuer undertakes to the beneficiary to honour a presentation that appears on its face to comply with the terms and conditions of the standby in accordance with these Rules supplemented by standard standby practice.
b. An issuer honours a complying presentation made to it by paying the amount demanded of it at sight, unless the standby provides for honour:
   i. by acceptance of a draft drawn by the beneficiary on the issuer, in which case the issuer honours by:
      (a) timely accepting the draft; and
      (b) thereafter paying the holder of the draft on presentation of the accepted draft on or after its maturity.
   ii. by deferred payment of a demand made by the beneficiary on the issuer, in which case the issuer honours by:
      (a) timely incurring a deferred payment obligation; and
      (b) thereafter paying at maturity.
   iii. by negotiation, in which case the issuer honours by paying the amount demanded at sight without recourse.
c. An issuer acts in a timely manner if it pays at sight, accepts a draft, or undertakes a deferred payment obligation (or if it gives notice of dishonour) within the time permitted for examining the presentation and giving notice of dishonour.
d. i. A confirmer undertakes to honour a complying presentation made to it by paying the amount demanded of it at sight or, if the standby so states, by another method of honour consistent with the issuer's undertaking.
   ii. If the confirmation permits presentation to the issuer, then the confirmer undertakes also to honour upon the issuer's wrongful dishonour by performing as if the presentation had been made to the confirmer.
   iii. If the standby permits presentation to the confirmer, then the issuer undertakes also to honour upon the confirmer's wrongful dishonour by performing as if the presentation had been made to the issuer.
e. An issuer honours by paying in immediately available funds in the currency designated in the standby unless the standby states it is payable by:
   i. payment of a monetary unit of account, in which case the undertaking is to pay in that unit of account; or
   ii. delivery of other items of value, in which case the undertaking is to deliver those items.

2.02 Obligation of Different Branches, Agencies, or Other Offices

For the purposes of these Rules, an issuer's branch, agency, or other office acting or undertaking to act under a standby in a capacity other than as issuer is obligated in

that capacity only and shall be treated as a different person.

2.03 Conditions to Issuance

A standby is issued when it leaves an issuer's control unless it clearly specifies that it is not then "issued" or "enforceable". Statements that a standby is not "available", "operative", "effective", or the like do not affect its irrevocable and binding nature at the time it leaves the issuer's control.

2.04 Nomination

a. A standby may nominate a person to advise, receive a presentation, effect a transfer, confirm, pay, negotiate, incur a deferred payment obligation, or accept a draft.
b. Nomination does not obligate the nominated person to act except to the extent that the nominated person undertakes to act.
c. A nominated person is not authorised to bind the person making the nomination.

2.05 Advice of Standby or Amendment

a. Unless an advice states otherwise, it signifies that:
   i. the advisor has checked the apparent authenticity of the advised message in accordance with standard letter of credit practice; and
   ii. the advice accurately reflects what has been received.
b. A person who is requested to advise a standby and decides not to do so should notify the requesting party.

2.06 When an Amendment is Authorised and Binding

a. If a standby expressly states that it is subject to "**automatic amendment**" by an increase or decrease in the amount available, an extension of the expiration date, or the like, the amendment is effective automatically without any further notification or consent beyond that expressly provided for in the standby. (Such an amendment may also be referred to as becoming effective "**without amendment**".)
b. If there is no provision for automatic amendment, an amendment binds:
   i. the issuer when it leaves the issuer's control; and
   ii. the confirmer when it leaves the confirmer's control, unless the confirmer indicates that it does not confirm the amendment.
c. If there is no provision for automatic amendment:
   i. the beneficiary must consent to the amendment for it to be binding;
   ii. the beneficiary's consent must be made by an express communication to the person advising the amendment unless the beneficiary presents documents which comply with the standby as amended and which would not comply with the standby prior to such amendment; and
   iii. an amendment does not require the applicant's consent to be binding on the issuer, the confirmer, or the beneficiary.
d. Consent to only part of an amendment is a rejection of the entire amendment.

2.07 Routing of Amendments

a. An issuer using another person to advise a standby must advise all amendments to that person.
b. An amendment or cancellation of a standby does not affect the issuer's obligation to a nominated person that has acted within the scope of its nomination before receipt of notice of the amendment or cancellation.
c. Non-extension of an automatically extendable (renewable) standby does not affect an issuer's obligation to a nominated person who has acted within the scope of its nomination before receipt of a notice of non-extension.

RULE 3: PRESENTATION

3.01 Complying Presentation under a Standby

A standby should indicate the time, place and location within that place, person to whom, and medium in which presentation should be made. If so, presentation must be so made in order to comply. To the extent that a standby does not so indicate, presentation must be made in accordance with these Rules in order to be complying.

3.02 What Constitutes a Presentation

The receipt of a document required by and presented under a standby constitutes a presentation requiring examination for compliance with the terms and conditions of the standby even if not all of the required documents have been presented.

3.03 Identification of Standby

a. A presentation must identify the standby under which the presentation is made.
b. A presentation may identify the standby by stating the complete reference number of the standby and the name and location of the issuer or by attaching the original or a copy of the standby.
c. If the issuer cannot determine from the face of a document received that it should be processed under a standby or cannot identify the standby to which it relates, presentation is deemed to have been made on the date of identification.

3.04 Where and to Whom Complying Presentation Made

a. To comply, a presentation must be made at the place and any location at that place indicated in the standby or provided in these Rules.
b. If no place of presentation to the issuer is indicated in the standby, presentation to the issuer must be made at the place of business from which the standby was issued.
c. If a standby is confirmed, but no place for presentation is indicated in the confirmation, presentation for the purpose of obligating the confirmer (and the issuer)

must be made at the place of business of the confirmer from which the confirmation was issued or to the issuer.

d. If no location at a place of presentation is indicated (such as department, floor, room, station, mail stop, post office box, or other location), presentation may be made to:
   i. the general postal address indicated in the standby;
   ii. any location at the place designated to receive deliveries of mail or documents; or
   iii. any person at the place of presentation actually or apparently authorised to receive it.

3.05 When Timely Presentation Made

a. A presentation is timely if made at any time after issuance and before expiry on the expiration date.
b. A presentation made after the close of business at the place of presentation is deemed to have been made on the next business day.

3.06 Complying Medium of Presentation

a. To comply, a document must be presented in the medium indicated in the standby.
b. Where no medium is indicated, to comply a document must be presented as a paper document, unless only a demand is required, in which case:
   i. a demand that is presented via S.W.I.F.T., tested telex, or other similar authenticated means by a beneficiary that is a S.W.I.F.T. participant or a bank complies; otherwise
   ii. a demand that is not presented as a paper document does not comply unless the issuer permits, in its sole discretion, the use of that medium.
c. A document is not presented as a paper document if it is communicated by electronic means even if the issuer or nominated person receiving it generates a paper document from it.
d. Where presentation in an electronic medium is indicated, to comply a document must be presented as an electronic record capable of being authenticated by the issuer or nominated person to whom it is presented.

3.07 Separateness of Each Presentation

a. Making a non-complying presentation, withdrawing a presentation, or failing to make any one of a number of scheduled or permitted presentations does not waive or otherwise prejudice the right to make another timely presentation or a timely re-presentation whether or not the standby prohibits partial or multiple drawings or presentations.
b. Wrongful dishonour of a complying presentation does not constitute dishonour of any other presentation under a standby or repudiation of the standby.
c. Honour of a non-complying presentation, with or without notice of its non-compliance, does not waive requirements of a standby for other presentations.

3.08 Partial Drawing and Multiple Presentations; Amount of Drawings

a. A presentation may be made for less than the full amount available (**"partial drawing"**).
b. More than one presentation (**"multiple presentations"**) may be made.
c. The statement "partial drawings prohibited" or a similar expression means that a presentation must be for the full amount available.
d. The statement "multiple drawings prohibited" or a similar expression means that only one presentation may be made and honoured but that it may be for less than the full amount available.
e. If a demand exceeds the amount available under the standby, the drawing is discrepant. Any document other than the demand stating an amount in excess of the amount demanded is not discrepant for that reason.
f. Use of **"approximately"**, **"about"**, **"circa"**, or a similar word permits a tolerance not to exceed 10% more or 10% less of the amount to which such word refers.

3.09 Extend or Pay

A beneficiary's request to extend the expiration date of the standby or, alternatively, to pay the amount available under it:

a. is a presentation demanding payment under the standby, to be examined as such in accordance with these Rules; and
b. implies that the beneficiary:
   i. consents to the amendment to extend the expiry date to the date requested;
   ii. requests the issuer to exercise its discretion to seek the approval of the applicant and to issue that amendment;
   iii. upon issuance of that amendment, retracts its demand for payment; and
   iv. consents to the maximum time available under these Rules for examination and notice of dishonour.

3.10 No Notice of Receipt of Presentation

An issuer is not required to notify the applicant of receipt of a presentation under the standby.

3.11 Issuer Waiver and Applicant Consent to Waiver of Presentation Rules

In addition to other discretionary provisions in a standby or these Rules, an issuer may, in its sole discretion, without notice to or consent of the applicant and without effect on the applicant's obligations to the issuer, waive

a. the following Rules and any similar terms stated in the standby which are primarily for the issuer's benefit or operational convenience:
   i. treatment of documents received, at the request of the presenter, as having been presented at a later date (Rule 3.02);
   ii. identification of a presentation to the standby under which it is presented (Rule 3.03(a));
   iii. where and to whom presentation is made (Rule 3.04(b), (c), and (d)), except the country of presentation stated in the standby; or
   iv. treatment of a presentation made after the close of business as if it were made on the next business day (Rule 3.05(b)).

b. the following Rule but not similar terms stated in the standby:
   i. a required document dated after the date of its stated presentation (Rule 4.06); or
   ii. the requirement that a document issued by the beneficiary be in the language of the standby (Rule 4.04).
c. the following Rule relating to the operational integrity of the standby only in so far as the bank is in fact dealing with the true beneficiary:
   acceptance of a demand in an electronic medium (Rule 3.06(b)).

Waiver by the confirmer requires the consent of the issuer with respect to paragraphs (b) and (c) of this Rule.

3.12 Original Standby Lost, Stolen, Mutilated, or Destroyed

a. If an original standby is lost, stolen, mutilated, or destroyed, the issuer need not replace it or waive any requirement that the original be presented under the standby.
b. If the issuer agrees to replace an original standby or to waive a requirement for its presentation, it may provide a replacement or copy to the beneficiary without affecting the applicant's obligations to the issuer to reimburse, but, if it does so, the issuer must mark the replacement or copy as such. The issuer may, in its sole discretion, require indemnities satisfactory to it from the beneficiary and assurances from nominated persons that no payment has been made.

CLOSURE ON EXPIRY DATE

3.13 Expiration Date on a Non-Business Day

a. If the last day for presentation stated in a standby (whether stated to be the expiration date or the date by which documents must be received) is not a business day of the issuer or nominated person where presentation is to be made, then presentation made there on the first following business day shall be deemed timely.
b. A nominated person to whom such a presentation is made must so notify the issuer.

3.14 Closure on a Business Day and Authorization of Another Reasonable Place for Presentation

a. If on the last business day for presentation the place for presentation stated in a standby is for any reason closed and presentation is not timely made because of the closure, then the last day for presentation is automatically extended to the day occurring thirty calendar days after the place for presentation re-opens for business, unless the standby otherwise provides.
b. Upon or in anticipation of closure of the place of presentation, an issuer may authorise another reasonable place for presentation in the standby or in a communication received by the beneficiary. If it does so, then
   i. presentation must be made at that reasonable place; and
   ii. if the communication is received fewer than thirty calendar days before the last day for presentation and for that reason presentation is not timely made, the last day for presentation is automatically extended to the day occurring thirty calendar days after the last day for presentation.

RULE 4: EXAMINATION

4.01 Examination for Compliance

a. Demands for honour of a standby must comply with the terms and conditions of the standby.
b. Whether a presentation appears to comply is determined by examining the presentation on its face against the terms and conditions stated in the standby as interpreted and supplemented by these Rules which are to be read in the context of standard standby practice.

4.02 Non-Examination of Extraneous Documents

Documents presented which are not required by the standby need not be examined and, in any event, shall be disregarded for purposes of determining compliance of the presentation. They may without responsibility be returned to the presenter or passed on with the other documents presented.

4.03 Examination for Inconsistency

An issuer or nominated person is required to examine documents for inconsistency with each other only to the extent provided in the standby.

4.04 Language of Documents

The language of all documents issued by the beneficiary is to be that of the standby.

4.05 Issuer of Documents

Any required document must be issued by the beneficiary unless the standby indicates that the document is to be issued by a third person or the document is of a type that standard standby practice requires to be issued by a third person.

4.06 Date of Documents

The issuance date of a required document may be earlier but not later than the date of its presentation.

4.07 Required Signature on a Document

a. A required document need not be signed unless the standby indicates that the document must be signed or the document is of a type that standard standby practice requires be signed.
b. A required signature may be made in any manner that corresponds to the medium in which the signed document is presented.
c. Unless a standby specifies:
   i. the name of a person who must sign a document, any signature or authentication will be regarded as a complying signature.
   ii. the status of a person who must sign, no indication of status is necessary.

d. If a standby specifies that a signature must be made by:
   i. a named natural person without requiring that the signer's status be identified, a signature complies that appears to be that of the named person;
   ii. a named legal person or government agency without identifying who is to sign on its behalf or its status, any signature complies that appears to have been made on behalf of the named legal person or government agency; or
   iii. a named natural person, legal person, or government agency requiring the status of the signer be indicated, a signature complies which appears to be that of the named natural person, legal person, or government agency and indicates its status.

4.08 Demand Document Implied

If a standby does not specify any required document, it will still be deemed to require a documentary demand for payment.

4.09 Identical Wording and Quotation Marks

If a standby requires:

a. a statement without specifying precise wording, then the wording in the document presented must appear to convey the same meaning as that required by the standby;
b. specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, then typographical errors in spelling, punctuation, spacing, or the like that are apparent when read in context are not required to be duplicated and blank lines or spaces for data may be completed in any manner not inconsistent with the standby; or
c. specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, and also provides that the specified wording be "exact" or "identical", then the wording in the documents presented must duplicate the specified wording, including typographical errors in spelling, punctuation, spacing and the like, as well as blank lines and spaces for data must be exactly reproduced.

4.10 Applicant Approval

A standby should not specify that a required document be issued, signed, or counter-signed by the applicant. However, if the standby includes such a requirement, the issuer may not waive the requirement and is not responsible for the applicant's withholding of the document or signature.

4.11 Non-Documentary Terms or Conditions

a. A standby term or condition which is non-documentary must be disregarded whether or not it affects the issuer's obligation to treat a presentation as complying or to treat the standby as issued, amended, or terminated.
b. Terms or conditions are non-documentary if the standby does not require presentation of a document in which they are to be evidenced and if their fulfillment cannot be determined by the issuer from the issuer's own records or within the issuer's normal operations.
c. Determinations from the issuer's own records or within the issuer's normal operations include determinations of:
   i. when, where, and how documents are presented or otherwise delivered to the issuer;
   ii. when, where, and how communications affecting the standby are sent or received by the issuer, beneficiary, or any nominated person;
   iii. amounts transferred into or out of accounts with the issuer; and
   iv. amounts determinable from a published index (e.g., if a standby provides for determining amounts of interest accruing according to published interest rates).
d. An issuer need not re-compute a beneficiary's computations under a formula stated or referenced in a standby except to the extent that the standby so provides.

4.12 Formality of Statements in Documents

a. A required statement need not be accompanied by a solemnity, officialization, or any other formality.
b. If a standby provides for the addition of a formality to a required statement by the person making it without specifying form or content, the statement complies if it indicates that it was declared, averred, warranted, attested, sworn under oath, affirmed, certified, or the like.
c. If a standby provides for a statement to be witnessed by another person without specifying form or content, the witnessed statement complies if it appears to contain a signature of a person other than the beneficiary with an indication that the person is acting as a witness.
d. If a standby provides for a statement to be countersigned, legalized, visaed, or the like by a person other than the beneficiary acting in a governmental, judicial, corporate, or other representative capacity without specifying form or content, the statement complies if it contains the signature of a person other than the beneficiary and includes an indication of that person's representative capacity and the organization on whose behalf the person has acted.

4.13 No Responsibility to Identify Beneficiary

Except to the extent that a standby requires presentation of an electronic record:

a. a person honouring a presentation has no obligation to the applicant to ascertain the identity of any person making a presentation or any assignee of proceeds;
b. payment to a named beneficiary, transferee, an acknowledged assignee, successor by operation of law, to an account or account number stated in the standby or in a cover instruction from the beneficiary or nominated person fulfills the obligation under the standby to effect payment.

4.14 Name of Acquired or Merged Issuer or Confirmer

If the issuer or confirmer is reorganized, merged, or changes its name, any required reference by name to the issuer or confirmer in the documents presented may be to it or its successor.

4.15 Original, Copy, and Multiple Documents

a. A presented document must be an original.

b. Presentation of an electronic record, where an electronic presentation is permitted or required, is deemed to be an **"original"**.

c. i. A presented document is deemed to be an original unless it appears on its face to have been reproduced from an original.

ii. A document which appears to have been reproduced from an original is deemed to be an original if the signature or authentication appears to be original.

d. A standby that requires presentation of a **"copy"** permits presentation of either an original or copy unless the standby states that only a copy be presented or otherwise addresses the disposition of all originals.

e. If multiples of the same document are requested, only one must be an original unless:

i. "duplicate originals" or "multiple originals" are requested in which case all must be originals; or

ii. "two copies", "two-fold", or the like are requested in which case either originals or copies may be presented.

STANDBY DOCUMENT TYPES

4.16 Demand for Payment

a. A demand for payment need not be separate from the beneficiary's statement or other required document.

b. If a separate demand is required, it must contain:

i. a demand for payment from the beneficiary directed to the issuer or nominated person;

ii. a date indicating when the demand was issued;

iii. the amount demanded; and

iv. the beneficiary's signature.

c. A demand may be in the form of a draft or other instruction, order, or request to pay. If a standby requires presentation of a "draft" or "bill of exchange", that draft or bill of exchange need not be in negotiable form unless the standby so states.

4.17 Statement of Default or Other Drawing Event

If a standby requires a statement, certificate, or other recital of a default or other drawing event and does not specify content, the document complies if it contains:

a. a representation to the effect that payment is due because a drawing event described in the standby has occurred;

b. a date indicating when it was issued; and

c. the beneficiary's signature.

4.18 Negotiable Documents

If a standby requires presentation of a document that is transferable by endorsement and delivery without stating whether, how, or to whom endorsement must be made, then the document may be presented without endorsement, or, if endorsed, the endorsement may be in blank and, in any event, the document may be issued or negotiated with or without recourse.

4.19 Legal or Judicial Documents

If a standby requires presentation of a government-issued document, a court order, an arbitration award, or the like, a document or a copy is deemed to comply if it appears to be:

i. issued by a government agency, court, tribunal, or the like;

ii. suitably titled or named;

iii. signed;

iv. dated; and

v. originally certified or authenticated by an official of a government agency, court, tribunal, or the like.

4.20 Other Documents

a. If a standby requires a document other than one whose content is specified in these Rules without specifying the issuer, data content, or wording, a document complies if it appears to be appropriately titled or to serve the function of that type of document under standard standby practice.

b. A document presented under a standby is to be examined in the context of standby practice under these Rules even if the document is of a type (such as a commercial invoice, transport documents, insurance documents or the like) for which the Uniform Customs and Practice for Documentary Credits contains detailed rules.

4.21 Request to Issue Separate Undertaking

If a standby requests that the beneficiary of the standby issue its own separate undertaking to another (whether or not the standby recites the text of that undertaking):

a. the beneficiary receives no rights other than its rights to draw under the standby even if the issuer pays a fee to the beneficiary for issuing the separate undertaking,

b. neither the separate undertaking nor any documents presented under it need be presented to the issuer: and

c. if originals or copies of the separate undertaking or documents presented under it are received by the issuer although not required to be presented as a condition to honour of the standby:

i. the issuer need not examine, and, in any event, shall disregard their compliance or consistency with the standby, with the beneficiary's demand under the standby, or with the beneficiary's separate undertaking; and

ii. the issuer may without responsibility return them to the presenter or forward them to the applicant with the presentation.

RULE 5: NOTICE, PRECLUSION, AND DISPOSITION OF DOCUMENTS

5.01 Timely Notice of Dishonour

a. Notice of dishonour must be given within a time after presentation of documents which is not unreasonable.

i. Notice given within three business days is deemed to be not unreasonable and beyond seven business days is deemed to be unreasonable.

ii. Whether the time within which notice is given is unreasonable does not depend upon an imminent deadline for presentation.
iii. The time for calculating when notice of dishonour must be given begins on the business day following the business day of presentation.
iv. Unless a standby otherwise expressly states a shortened time within which notice of dishonour must be given, the issuer has no obligation to accelerate its examination of a presentation.

b. i. The means by which a notice of dishonour is to be given is by telecommunication, if available, and, if not, by another available means which allows for prompt notice.
ii. If notice of dishonour is received within the time permitted for giving the notice, then it is deemed to have been given by prompt means.

c. Notice of dishonour must be given to the person from whom the documents were received (whether the beneficiary, nominated person, or person other than a delivery person) except as otherwise requested by the presenter.

5.02 Statement of Grounds for Dishonour

A notice of dishonour shall state all discrepancies upon which dishonour is based.

5.03 Failure to Give Timely Notice of Dishonour

a. Failure to give notice of a discrepancy in a notice of dishonour within the time and by the means specified in the standby or these rules precludes assertion of that discrepancy in any document containing the discrepancy that is retained or re-presented, but does not preclude assertion of that discrepancy in any different presentation under the same or a separate standby.

b. Failure to give notice of dishonour or acceptance or acknowledgment that a deferred payment undertaking has been incurred obligates the issuer to pay at maturity.

5.04 Notice of Expiry

Failure to give notice that a presentation was made after the expiration date does not preclude dishonour for that reason.

5.05 Issuer Request for Applicant Waiver without Request by Presenter

If the issuer decides that a presentation does not comply and if the presenter does not otherwise instruct, the issuer may, in its sole discretion, request the applicant to waive non-compliance or otherwise to authorise honour within the time available for giving notice of dishonour but without extending it. Obtaining the applicant's waiver does not obligate the issuer to waive non-compliance.

5.06 Issuer Request for Applicant Waiver upon Request of Presenter

If, after receipt of notice of dishonour, a presenter requests that the presented documents be forwarded to the issuer or that the issuer seek the applicant's waiver:

a. no person is obligated to forward the discrepant documents or seek the applicant's waiver;

b. the presentation to the issuer remains subject to these Rules unless departure from them is expressly consented to by the presenter; and

c. if the documents are forwarded or if a waiver is sought:
i. the presenter is precluded from objecting to the discrepancies notified to it by the issuer;
ii. the issuer is not relieved from examining the presentation under these Rules;
iii. the issuer is not obligated to waive the discrepancy even if the applicant waives it; and
iv. the issuer must hold the documents until it receives a response from the applicant or is requested by the presenter to return the documents, and if the issuer receives no such response or request within ten business days of its notice of dishonour, it may return the documents to the presenter.

5.07 Disposition of Documents

Dishonoured documents must be returned, held, or disposed of as reasonably instructed by the presenter. Failure to give notice of the disposition of documents in the notice of dishonour does not preclude the issuer from asserting any defense otherwise available to it against honour.

5.08 Cover Instructions/Transmittal Letter

a. Instructions accompanying a presentation made under a standby may be relied on to the extent that they are not contrary to the terms or conditions of the standby, the demand, or these Rules.

b. Representations made by a nominated person accompanying a presentation may be relied upon to the extent that they are not contrary to the terms or conditions of a standby or these Rules.

c. Notwithstanding receipt of instructions, an issuer or nominated person may pay, give notice, return the documents, or otherwise deal directly with the presenter.

d. A statement in the cover letter that the documents are discrepant does not relieve the issuer from examining the presentation for compliance.

5.09 Applicant Notice of Objection

a. An applicant must timely object to an issuer's honour of a noncomplying presentation by giving timely notice by prompt means.

b. An applicant acts timely if it objects to discrepancies by sending a notice to the issuer stating the discrepancies on which the objection is based within a time after the applicant's receipt of the documents which is not unreasonable.

c. Failure to give a timely notice of objection by prompt means precludes assertion by the applicant against the issuer of any discrepancy or other matter apparent on the face of the documents received by the applicant, but does not preclude assertion of that objection to any different presentation under the same or a different standby.

RULE 6: TRANSFER, ASSIGNMENT, AND TRANSFER BY OPERATION OF LAW

TRANSFER OF DRAWING RIGHTS

6.01 Request to Transfer Drawing Rights

Where a beneficiary requests that an issuer or nominated person honour a drawing from another person as if that person were the beneficiary, these Rules on transfer of drawing rights ("**transfer**") apply.

6.02 When Drawing Rights are Transferable

a. A standby is not transferable unless it so states.
b. A standby that states that it is transferable without further provision means that drawing rights:
   i. may be transferred in their entirety more than once;
   ii. may not be partially transferred; and
   iii. may not be transferred unless the issuer (including the confirmer) or another person specifically nominated in the standby agrees to and effects the transfer requested by the beneficiary.

6.03 Conditions to Transfer

An issuer of a transferable standby or a nominated person need not effect a transfer unless:
a. it is satisfied as to the existence and authenticity of the original standby; and
b. the beneficiary submits or fulfills:
   i. a request in a form acceptable to the issuer or nominated person including the effective date of the transfer and the name and address of the transferee;
   ii. the original standby;
   iii. verification of the signature of the person signing for the beneficiary;
   iv. verification of the authority of the person signing for the beneficiary;
   v. payment of the transfer fee; and
   vi. any other reasonable requirements.

6.04 Effect of Transfer on Required Documents

Where there has been a transfer of drawing rights in their entirety:
a. a draft or demand must be signed by the transferee beneficiary; and
b. the name of the transferee beneficiary may be used in place of the name of the transferor beneficiary in any other required document.

6.05 Reimbursement for Payment Based on a Transfer

An issuer or nominated person paying under a transfer pursuant to Rule 6.03(a), (b)(i), and (b)(ii) is entitled to reimbursement as if it had made payment to the beneficiary.

ACKNOWLEDGMENT OF ASSIGNMENT OF PROCEEDS

6.06 Assignment of Proceeds

Where an issuer or nominated person is asked to acknowledge a beneficiary's request to pay an assignee all or part of any proceeds of the beneficiary's drawing under the standby, these Rules on acknowledgment of an assignment of proceeds apply except where applicable law otherwise requires.

6.07 Request for Acknowledgment

a. Unless applicable law otherwise requires, an issuer or nominated person
   i. is not obligated to give effect to an assignment of proceeds which it has not acknowledged; and
   ii. is not obligated to acknowledge the assignment.
b. If an assignment is acknowledged:
   i. the acknowledgment confers no rights with respect to the standby to the assignee who is only entitled to the proceeds assigned, if any, and whose rights may be affected by amendment or cancellation; and
   ii. the rights of the assignee are subject to:
      (a) the existence of any net proceeds payable to the beneficiary by the person making the acknowledgment;
      (b) rights of nominated persons and transferee beneficiaries;
      (c) rights of other acknowledged assignees; and
      (d) any other rights or interests that may have priority under applicable law.

6.08 Conditions to Acknowledgment of Assignment of Proceeds

An issuer or nominated person may condition its acknowledgment on receipt of:
a. the original standby for examination or notation;
b. verification of the signature of the person signing for the beneficiary;
c. verification of the authority of the person signing for the beneficiary;
d. an irrevocable request signed by the beneficiary for acknowledgment of the assignment that includes statements, covenants, indemnities, and other provisions which may be contained in the issuer's or nominated person's required form requesting acknowledgment of assignment, such as:
   i. the identity of the affected drawings if the standby permits multiple drawings;
   ii. the full name, legal form, location, and mailing address of the beneficiary and the assignee;
   iii. details of any request affecting the method of payment or delivery of the standby proceeds;
   iv. limitation on partial assignments and prohibition of successive assignments;
   v. statements regarding the legality and relative priority of the assignment; or
   vi. right of recovery by the issuer or nominated person of any proceeds received by the assignee that are recoverable from the beneficiary;
e. payment of a fee for the acknowledgment; and
f. fulfillment of other reasonable requirements.

6.09 Conflicting Claims to Proceeds

If there are conflicting claims to proceeds, then payment to an acknowledged assignee may be suspended pending resolution of the conflict.

6.10 Reimbursement for Payment Based on an Assignment

An issuer or nominated person paying under an acknowledged assignment pursuant to Rule 6.08(a) and (b) is entitled to reimbursement as if it had made payment to the beneficiary. If the beneficiary is a bank, the acknowledgment may be based solely upon an authenticated communication.

TRANSFER BY OPERATION OF LAW

6.11 Transferee by Operation of Law

Where an heir, personal representative, liquidator, trustee, receiver, successor corporation, or similar person who claims to be designated by law to succeed to the interests of a beneficiary presents documents in its own name as if it were the authorised transferee of the beneficiary, these Rules on transfer by operation of law apply.

6.12 Additional Document in Event of Drawing in Successor's Name

A claimed successor may be treated as if it were an authorised transferee of a beneficiary's drawing rights in their entirety if it presents an additional document or documents which appear to be issued by a public official or representative (including a judicial officer) and indicate:

a. that the claimed successor is the survivor of a merger, consolidation, or similar action of a corporation, limited liability company, or other similar organization;
b. that the claimed successor is authorised or appointed to act on behalf of the named beneficiary or its estate because of an insolvency proceeding;
c. that the claimed successor is authorised or appointed to act on behalf of the named beneficiary because of death or incapacity; or
d. that the name of the named beneficiary has been changed to that of the claimed successor.

6.13 Suspension of Obligations upon Presentation by Successor

An issuer or nominated person which receives a presentation from a claimed successor which complies in all respects except for the name of the beneficiary:

a. may request in a manner satisfactory as to form and substance:
   i. a legal opinion;
   ii. an additional document referred to in Rule 6.12 (Additional Document in Event of Drawing in Successor's Name) from a public official;
   iii. statements, covenants, and indemnities regarding the status of the claimed successor as successor by operation of law;
   iv. payment of fees reasonably related to these determinations; and
   v. anything which may be required for a transfer under Rule 6.03 (Conditions to Transfer) or an acknowledgment of assignment of proceeds under Rule 6.08 (Conditions to Acknowledgment of Assignment of Proceeds);

   but such documentation shall not constitute a required document for purposes of expiry of the standby.
b. Until the issuer or nominated person receives the requested documentation, its obligation to honour or give notice of dishonour is suspended, but any deadline for presentation of required documents is not thereby extended.

6.14 Reimbursement for Payment Based on a Transfer by Operation of Law

An issuer or nominated person paying under a transfer by operation of law pursuant to Rule 6.12 (Additional Document in Event of Drawing in Successor's Name) is entitled to reimbursement as if it had made payment to the beneficiary.

RULE 7: CANCELLATION

7.01 When an Irrevocable Standby is Cancelled or Terminated

A beneficiary's rights under a standby may not be cancelled without its consent. Consent may be evidenced in writing or by an action such as return of the original standby in a manner which implies that the beneficiary consents to cancellation. A beneficiary's consent to cancellation is irrevocable when communicated to the issuer.

7.02 Issuer's Discretion Regarding a Decision to Cancel

Before acceding to a beneficiary's authorization to cancel and treating the standby as cancelled for all purposes, an issuer may require in a manner satisfactory as to form and substance:

a. the original standby;
b. verification of the signature of the person signing for the beneficiary;
c. verification of the authorization of the person signing for the beneficiary;
d. a legal opinion;
e. an irrevocable authority signed by the beneficiary for cancellation that includes statements, covenants, indemnities, and similar provisions contained in a required form;
f. satisfaction that the obligation of any confirmer has been cancelled;
g. satisfaction that there has not been a transfer or payment by any nominated person; and
h. any other reasonable measure.

RULE 8: REIMBURSEMENT OBLIGATIONS

8.01 Right to Reimbursement

a. Where payment is made against a complying presentation in accordance with these Rules, reimbursement must be made by:
   i. an applicant to an issuer requested to issue a standby; and
   ii. an issuer to a person nominated to honour or otherwise give value.

b. An applicant must indemnify the issuer against all claims, obligations, and responsibilities (including attorney's fees) arising out of:
   i. the imposition of law or practice other than that chosen in the standby or applicable at the place of issuance;
   ii. the fraud, forgery, or illegal action of others; or
   iii. the issuer's performance of the obligations of a confirmer that wrongfully dishonours a confirmation.

c. This Rule supplements any applicable agreement, course of dealing, practice, custom or usage providing for reimbursement or indemnification on lesser or other grounds.

8.02 Charges for Fees and Costs

a. An applicant must pay the issuer's charges and reimburse the issuer for any charges that the issuer is obligated to pay to persons nominated with the applicant's consent to advise, confirm, honour, negotiate, transfer, or to issue a separate undertaking.

b. An issuer is obligated to pay the charges of other persons:
   i. if they are payable in accordance with the terms of the standby; or
   ii. if they are the reasonable and customary fees and expenses of a person requested by the issuer to advise, honour, negotiate, transfer, or to issue a separate undertaking, and they are unrecovered and unrecoverable from the beneficiary or other presenter because no demand is made under the standby.

8.03 Refund of Reimbursement

A nominated person that obtains reimbursement before the issuer timely dishonours the presentation must refund the reimbursement with interest if the issuer dishonours. The refund does not preclude the nominated person's wrongful dishonour claims.

8.04 Bank-to-Bank Reimbursement

Any instruction or authorization to obtain reimbursement from another bank is subject to the International Chamber of Commerce standard rules for bank-to-bank reimbursements.

RULE 9: TIMING

9.01 Duration of Standby

A standby must:

a. contain an expiry date; or

b. permit the issuer to terminate the standby upon reasonable prior notice or payment.

9.02 Effect of Expiration on Nominated Person

The rights of a nominated person that acts within the scope of its nomination are not affected by the subsequent expiry of the standby.

9.03 Calculation of Time

a. A period of time within which an action must be taken under these Rules begins to run on the first business day following the business day when the action could have been undertaken at the place where the action should have been undertaken.

b. An extension period starts on the calendar day following the stated expiry date even if either day falls on a day when the issuer is closed.

9.04 Time of Day of Expiration

If no time of day is stated for expiration, it occurs at the close of business at the place of presentation.

9.05 Retention of Standby

Retention of the original standby does not preserve any rights under the standby after the right to demand payment ceases.

RULE 10: SYNDICATION / PARTICIPATION

10.01 Syndication

If a standby with more than one issuer does not state to whom presentation may be made, presentation may be made to any issuer with binding effect on all issuers.

10.02 Participation

a. Unless otherwise agreed between an applicant and an issuer, the issuer may sell participations in the issuer's rights against the applicant and any presenter and may disclose relevant applicant information in confidence to potential participants.

b. An issuer's sale of participations does not affect the obligations of the issuer under the standby or create any rights or obligations between the beneficiary and any participant.

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UNIFORM RULES FOR CONTRACT BONDS (URCB)

Report of the Secretary-General

1. By letter of 27 April 1999 (reproduced in annex I), the Secretary General of the International Chamber of Commerce (ICC) requested the Commission to give its formal recognition and endorsement to the Uniform Rules on Contract Bonds (URCB). The original text of the URCB, in English, French or Spanish, is reproduced in annex III.

2. As stated in the Foreword to the URCB,

> "Due to a need in the insurance industry for a uniform set of rules applicable internationally to contract bonds creating obligations of an accessory nature, the ICC Commission of Insurance undertook to elaborate the ICC Uniform Rules for Contract Bonds."

3. For further background information on the URCB, the Introduction and General notes from the ICC publication are set out at annex II.

V.99-83973

ANNEX I

(Original: English)

Letter of Ms Maria Livanos Cattaui, Secretary General of the
International Chamber of Commerce

As you may be aware, several years ago ICC published a set of Uniform Rules for Contract Bonds (URCB). I write to ask that UNCITRAL give its formal recognition and endorsement to these rules. ICC is seeking similar endorsements from the World Bank, EU and Inter-American Development Bank.

The URCB deal with Conditional Guarantees, so-called accessory bonds, which relate directly to the underlying contract that is being guaranteed for performance purposes.

Today, the URCB exist in several languages (including English, Spanish, French, Italian, Icelandic, Japanese, Chinese and Korean). The Government of Japan, the International Federation of Consulting Engineers (FIDIC), the Institution of Electrical Engineers (IEE), the International Credit Insurance Association (ICIA), the Association of International French Contractors (SEFI), and the Panamerican Surety Association (PASA), among others, have adopted the URCB as a recommended standard for bonds issued by their members.

The use of URCB as a global framework for bonds will provide the desired uniformity in the domain of security forms, and thus help to promote international trade. We firmly believe that this new model form will be of benefit to the entire business community. Its recognition by public institutions will assist private contracting and facilitate the export and freedom of contracting worldwide.

ANNEX II

(Original: English, French, Spanish)

ICC UNIFORM RULES FOR CONTRACT BONDS

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INTRODUCTION

These Uniform Rules have been drawn up by an ICC Working Party of members representing the Commission on Insurance and the building and engineering industry for worldwide application in relation to Contract Bonds, being those bonds creating obligations of an accessory nature, where the liability of the Surety or Guarantor arises and is conditional upon an established default on the part of a Contractor (defined in these Rules as the Principal) under the Contract which is the subject matter of the relevant Bond. The Rules set out below will therefore apply where the intention of the parties is that the obligations of the Guarantor will depend upon the duties or liabilities of the Principal under the relevant Contract.

Bonds governed by the ICC Rules set out below are intended to operate so as to confer upon the Beneficiary in each instance security for the performance or execution of contract obligations or payment of any sums which may fall due to the Beneficiary as a result of any breach of obligation or default by the Principal under the Contract. The Bond is intended to ensure that, subject to its financial limits, either the obligations set out in the Contract will be performed or executed, or that upon default, the Beneficiary will recover any sum properly due notwithstanding the insolvency of the Principal or the Principal's failure for any other reason to satisfy or discharge its liability. Accordingly, where a Bond governed by these Rules is in force, the Beneficiary will have the additional assurance of the Guarantor's accessory obligations to ensure that the judgment or award of any competent court or arbitral tribunal is satisfied.

The relationship of the parties under a Bond governed by these Rules number 524 differs from that arising under the ICC Uniform Rules for Demand Guarantees number 458 (the Demand Rules). Where the intention is that the Beneficiary is to obtain security for the obligations of the Principal arising pursuant to the Contract but that the Guarantor's liability shall only arise in case of an established default under that Contract, these Rules should be selected.

General

These Rules are intended to provide a clear and concise scheme to regulate the nature of obligations arising under Bonds and claims procedure. Because the nature of a Bond regulated by these Rules is that the obligations of the parties are related directly to and depend upon the obligations of the parties arising under the Contract, the Rules do not contain detailed provisions dealing with documentary requirements or the problem of unfair calling. In the event of a dispute arising as to the liability of a

Guarantor, the Rules contemplate that such dispute will be determined by reference to the Contract. The Guarantor and the Principal are protected in that liability will arise only where default is established. The Beneficiary is protected by the assurance that any judgment or award will be discharged by the Guarantor if the Principal fails to do so.

The Uniform Rules for Contract Bonds number 524 set out below shall apply where expressly incorporated by the parties in accordance with their detailed provisions. These new Rules depend for their success upon their use by the international business community. The ICC recommends the use of these new Rules which will help to secure uniformity of practice in the operation and enforcement of Bonds.

ANNEX III

(Original: English, French, Spanish)

ICC UNIFORM RULES FOR CONTRACT BONDS

issued as ICC publication No. 524,
adopted by the ICC Executive Board on 23 April 1993,
come into effect on 1 January 1994

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Article 1

Scope and application

(a) These Rules shall be known as the "Uniform Rules for Contract Bonds" and shall apply to any Bond which states that these Rules shall apply, or otherwise incorporates these Rules by reference and, for such purposes, it shall suffice that the Bond incorporates a reference to these Rules and the publication number.

(b) If there shall be any conflict in the construction or operation of the obligations of any parties under a Bond between the provisions of these Rules and such Bond, or mandatory provisions of the Applicable Law regulating the same, the provisions of the Bond or, as the case may be, the mandatory provisions of the Applicable Law shall prevail.

Article 2

Definitions

In these Rules, words or expressions shall bear the meanings set out below and be construed accordingly

Advance Payment Bond
A Bond given by the Guarantor in favour of the Beneficiary to secure the repayment of any sum or sums advanced by the Beneficiary to the Principal under or for the purposes of the Contract, where such sum or sums is or are advanced before the carrying out of works, the performance of services or the supply or provision of any goods pursuant to such Contract.

Beneficiary
The party in whose favour a Bond is issued or provided.

Bond
Any bond, guarantee or other instrument in writing issued or executed by the Guarantor in favour of the Beneficiary pursuant to which the Guarantor undertakes on Default, either :

(i) to pay or satisfy any claim or entitlement to payment of damages, compensation or other financial relief up to the Bond Amount; or
(ii) to pay or satisfy such claim or entitlement up to the Bond Amount or at the Guarantor's option to perform or execute the Contract or any Contractual Obligation.

In either case where the liability of the Guarantor shall be accessory to the liability of the Principal under the Contract or such Contractual Obligation and such expression shall without limitation include Advance Payment Bonds, Maintenance Bonds, Performance Bonds, Retention Bonds and Tender Bonds.

Bond Amount
The sum inserted in the Bond as the maximum aggregate liability of the Guarantor as amended, varied or reduced from time to time or, following the payment of any amount in satisfaction or partial satisfaction of a claim under any Bond, such lesser sum as shall be calculated by deducting from the sum inserted in the Bond the amount of any such payment.

Contract
Any written agreement between the Principal and the Beneficiary for the carrying out of works, the performance of services or the supply or provision of any goods.

Contractual Obligation
Any duty, obligation or requirement imposed by a clause, paragraph, section, term, condition, provision or stipulation contained in or forming part of a Contract or tender.

Default
Any breach, default or failure to perform any Contractual Obligation which shall give rise to a claim for performance, damages, compensation or other financial remedy by the Beneficiary and which is established pursuant to paragraph j of Article 7.

Expiry Date
Either (a) the date fixed or the date of the event on which the obligations of the Guarantor under the Bond are expressed to expire or (b) if no such date is stipulated, the date determined in accordance with Article 4.

Guarantor
Any Person who shall issue or execute a Bond on behalf of a Principal.

Maintenance Bond
A Bond to secure Contractual Obligations relating to the maintenance of works or goods following the physical completion or the provision thereof, pursuant to a Contract.

Performance Bond
A Bond to secure the performance of any Contract or Contractual Obligation.

Person
Any company, corporation, firm, association, body, individual or any legal entity whatsoever.

Principal
Any Person who (i) either (a) submits a tender for the purpose of entering into a Contract with the Beneficiary or (b) enters into a Contract with the Beneficiary and (ii) assumes primary liability for all Contractual Obligations thereunder.

Retention Bond
A Bond to secure the payment of any sum or sums paid or released to the Principal by the Beneficiary before the date for payment or release thereof contained in the Contract.

Tender Bond
A Bond in respect of a tender to secure the payment of any loss or damage suffered or incurred by the Beneficiary arising out of the failure by the Principal to enter into a Contract or provide a Performance Bond or other Bond pursuant to such tender.

Writing and Written
Shall include any authenticated tele-transmissions or tested electronic data interchange ("EDI") message equivalent thereto.

Article 3

Form of bond and liability of the guarantor to the beneficiary

(a) The Bond should stipulate :

(i) The Principal.

(ii) The Beneficiary.

(iii) The Guarantor.

(iv) The Contract.

(v) Where the Bond does not extend to the whole of the Contract, the precise Contractual Obligation or Obligations to which the Bond relates.

(vi) The Bond Amount.

(vii) Any provisions for the reduction of the Bond Amount.

(viii) The date when the Bond becomes effective (defined in these rules as the "Effective Date").

(ix) Whether the Guarantor shall be entitled at its option to perform or execute the Contract or any Contractual Obligation.

(x) The Expiry Date.

(xi) The names, addresses, telex and/or telefax numbers and contact references of the Beneficiary, the Guarantor and the Principal.

(xii) Whether sub-paragraph i of Article 7j is to apply and the name of the third party to be nominated thereunder for the purpose of Article 7 below (claims procedure).

(xiii) How disputes or differences between the Beneficiary, the Principal and the Guarantor in relation to the Bond are to be settled.

(b) The liability of the Guarantor to the Beneficiary under the Bond is accessory to the liability of the Principal to the Beneficiary under the Contract and shall arise upon Default. The Contract is deemed to be incorporated into and form part of the Bond. The liability of the Guarantor shall not exceed the Bond Amount.

(c) Save for any reduction of the Bond Amount under the terms of the Bond or the Contract and subject to Article 4, the liability of the Guarantor shall not be reduced or discharged by reason of any partial performance of the Contract or any Contractual Obligation.

(d) All defences, remedies, cross claims, counter-claims and other rights or entitlements to relief which the Principal may have against the Beneficiary under the Contract, or which may otherwise be available to the Principal in respect of the subject matter thereof, shall be available to the Guarantor in respect of any Default in addition to and without limiting any defence under or arising out of the Bond.

Article 4

Release and discharge of guarantor

(a) Subject to any contrary provision in the Bond and the provisions of paragraph b of this Article 4, the Expiry Date shall be six months from the latest date for the performance of the Contract or the relevant Contractual Obligations thereunder, as the case may be.

(b) Subject to any contrary provision of the Bond, the Expiry Date for the purposes of an Advance Payment Bond, a Maintenance Bond, a Retention Bond and a Tender Bond shall be as follows:

(i) In the case of an Advance Payment Bond, the date on which the Principal shall have carried out works, supplied goods or services or otherwise performed Contractual Obligations having a value as certified or otherwise determined pursuant to the Contract equal to or exceeding the Bond Amount.

(ii) In the case of a Maintenance Bond, six months after either the date stipulated by the Contract or, if no date has been specified for the termination of the Principal's maintenance obligations, the last day of the applicable warranty period or defects liability period under the Contract.

(iii) In the case of a Retention Bond, six months after the date stipulated by the Contract for the payment, repayment or release of any retention monies.

(iv) In the case of a Tender Bond, six months after the latest date set out in the tender documents or conditions for the submission of tenders.

(c) Where the Expiry Date falls on a day which is not a Business Day, the Expiry Date shall be the first following Business Day. For the purpose of these Rules "Business Day" shall mean any day on which the offices of the Guarantor shall ordinarily be open for business.

(d) A Bond shall terminate and, without prejudice to any term, provision, agreement or stipulation of the Bond, any other agreement or the Applicable Law providing for earlier release or discharge, the liability of the Guarantor shall be discharged absolutely and the Guarantor shall be released upon the Expiry Date whether or not the Bond shall be returned to the Guarantor, save in respect of any claim served in accordance with Article 7.

(e) Notwithstanding the provisions of paragraph d of this Article 4, the Bond may be cancelled at any time by the return of the Bond itself to the Guarantor or by the service upon and delivery or transmission to the Guarantor of a release in writing duly signed by an authorised representative of the Beneficiary, whether or not accompanied by the Bond and/or any amendment or amendments thereto.

(f) The Guarantor shall promptly inform the Principal of any payment made under or pursuant to the Bond and of the cancellation, release or discharge thereof or any reduction in the Bond Amount where the same shall not already have been communicated.

Article 5

Return of the bond

The Bond shall immediately after release or discharge under these Rules be returned to the Guarantor, and the retention or possession of the Bond following such release or discharge shall not of itself operate to confer any right or entitlement thereunder upon the Beneficiary.

Article 6

Amendments and variations to and of the contract and the bond and extensions of time

(a) The Bond shall, subject to the Bond Amount and the Expiry Date, apply to the Contract as amended or varied by the Principal and the Beneficiary from time to time.

(b) A Tender Bond shall be valid only in respect of the works and contract particulars set out or described in the tender documents at the Effective Date, and shall not apply beyond the Expiry Date or in any case where there shall be any substantial or material variation of or amendment to the original tender after the Effective Date, unless the Guarantor shall confirm, in the same manner as set out in paragraph c of this Article 6, that the Tender Bond so applies or the Expiry Date has been extended.

(c) Any amendment to a Bond, including without limitation the increase of the Bond Amount or the alteration of the Expiry Date, shall be in writing duly signed or executed by authorised representatives of each of the Beneficiary, the Principal and the Guarantor.

Article 7

Submission of claims and claims procedure

(a) A claim under a Bond shall be in writing and shall be served upon the Guarantor on or before the Expiry Date and by no later than the close of the Business Day at the Guarantor's principal place of business set out in the Bond, on the Expiry Date.

(b) A claim submitted by authenticated tele-transmission, EDI, telex or other means of telefax facsimile or electronic transmission shall be deemed to be received on the arrival of such transmission.

(c) A claim delivered to the Guarantor's principal place of business set out in the Bond shall, subject to proof of delivery, be deemed to be served on the date of such delivery.

(d) A claim served or transmitted by post shall, subject to satisfactory proof of delivery by the Beneficiary, be deemed to be served upon actual receipt thereof by the Guarantor.

(e) The Beneficiary shall, when giving notice of any claim by telefax or other tele-transmission or EDI, also send a copy of such claim by post.

(f) Any claim shall state brief details of the Contract to identify the same, state that there has been a breach or default and set out the circumstances of such breach or default and any request for payment, performance or execution.

(g) Upon receipt of a claim from the Beneficiary, the Guarantor shall send notice in writing to the Principal of such claim as soon as reasonably practicable and before either (a) making any payment in satisfaction or partial satisfaction of the same or (b) performing the Contract or any part thereof pursuant to a Contractual Obligation.

(h) The Beneficiary shall, upon written request by the Guarantor, supply to the Guarantor such further information as the Guarantor may reasonably request to enable it to consider the claim, and shall provide copies of any correspondence or other documents relating to the Contract or the performance of any Contractual Obligations and allow the Guarantor, its employees, agents or representatives to inspect any works, goods or services carried out or supplied by the Principal.

(i) A claim shall not be honoured unless

(i) A Default has occurred ; and
(ii) The claim has been made and served in accordance with the provisions of paragraphs a-f of Article 7 on or before the Expiry Date.

(j) Notwithstanding any dispute or difference between the Principal and the Beneficiary in relation to the performance of the Contract or any Contractual Obligation, a Default shall be deemed to be established for the purposes of these Rules :

(i) upon issue of a certificate of Default by a third party (who may without limitation be an independent architect or engineer or a Pre-Arbitral referee of the ICC) if the Bond so provides and the service of such certificate or a certified copy thereof upon the Guarantor, or
(ii) if the Bond does not provide for the issue of a certificate by a third party, upon the issue of a certificate of Default by the Guarantor, or
(iii) by the final judgment, order or award of a court or tribunal of competent jurisdiction, and the issue of a certificate of Default under paragraph (i) or (ii) shall not restrict the rights of the parties to seek or require the determination of any dispute or difference arising under the Contract or the Bond or the review of any certificate of Default or payment made pursuant thereto by a court or tribunal of competent jurisdiction.

(k) A copy of any certificate of Default issued under j (i) or (ii) shall be given by the Guarantor to the Principal and the Beneficiary forthwith.

(l) The Guarantor shall consider any claim expeditiously and, if such claim is rejected, shall immediately give notice thereof to the Beneficiary by authenticated tele-transmission or other telefax, facsimile transmission, telex, cable or EDI, confirming the same by letter, setting out the grounds for such refusal including any defences or other matters raised under paragraph d of Article 3.

Article 8

Jurisdiction and settlement of disputes

(a) The Applicable Law shall be the law of the country selected by the parties to govern the operation of the Bond and, in the absence of any express choice of law, shall be the law governing the Contract and any dispute or difference arising under these Rules in relation to a Bond shall be determined in accordance with the Applicable Law.

(b) All disputes arising between the Beneficiary, the Principal and the Guarantor or any of them in relation to a Bond governed by these Rules shall, unless otherwise agreed, be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or

more arbitrators appointed in accordance with the said Rules.

(c) If the Bond shall exclude the operation of the arbitration provisions of this Article 8, any dispute between the parties to the Bond shall be determined by the courts of the country nominated in the Bond, or, if there is no such nomination, the competent court of the Guarantor's principal place of business or, at the option of the Beneficiary, the competent court of the country in which the branch of the Guarantor which issued the Bond is situated.

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INTERNATIONAL COMMERCIAL ARBITRATION

Possible future work in the area of international commercial arbitration

Note by the Secretariat

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INTRODUCTION

1. The Commission, during its thirty-first session, held on 10 June 1998 a special commemorative New York Convention Day in order to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The opening speech was made by the Secretary-General of the United Nations. In addition to speeches by former participants in the diplomatic conference that adopted the Convention, leading arbitration experts gave reports on matters such as the promotion of the Convention, its enactment and application. Reports were also given on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on practical difficulties that were encountered in practice but were not addressed in existing legislative or non-legislative texts on arbitration.[1]

2. In reports presented at that commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any work by the Commission would be desirable and feasible.

3. The Commission, with reference to the discussions at the New York Convention Day, considered that it would be useful to engage in a consideration of possible future work in the area of arbitration at its thirty-second session in 1999. It requested the Secretariat to prepare for the current session a note that would serve as a basis for the considerations of the Commission. It was noted by the Commission that, in addition to the considerations at the New York Convention Day, considerations at other international conferences of arbitration practitioners (such as the Congress of the International Council for Commercial Arbitration, Paris, 3-6 May 1998) might be taken into account in the preparation of the note.[2] The present note has been prepared pursuant to that request.

I. SUMMARY OF PROPOSALS

4. The present document briefly discusses certain issues and problems identified in arbitral practice in order to facilitate a discussion in the Commission as to whether it wishes to put any of those issues on its work programme. The issues discussed include certain aspects of conciliation proceedings; the legislative requirement of a written form for the arbitration agreement; arbitrability; sovereign immunity; consolidation of more than one case into one arbitral proceeding; confidentiality of information in arbitral proceedings; raising claims in arbitral proceedings for the purpose of set-off; decisions by "truncated" arbitral tribunals; liability of arbitrators; power by the arbitral tribunal to award interest; costs of arbitral proceedings; enforceability of interim measures of protection; and discretion to enforce an award that has been set aside in the State of origin. Any other issues

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[1] United Nations publication: Proceedings of the New York Convention Day Colloquium, "Enforcing arbitration awards under the New York Convention: experience and prospects", May, 1999, ISBN 92-1-133609-0.

[2] Report of the United Nations Commission on International Trade Law on the work of its thirty-first session (1998), Official Records of the General Assembly, Fifty-third Session, Supplement No. 17, Doc. A/53/17, para. 235.

pertaining to the law of arbitration may be raised at the session of the Commission for possible consideration by the Commission.

5. The Commission may wish to consider the desirability of preparing uniform provisions on any of those issues, possibly indicating whether further work should be towards a legislative text (such as a model legislative provision or a treaty) or a non-legislative text (such as a model contractual rule). Even if ultimately no uniform solutions would be prepared, an in-depth discussion by delegates from all major legal, social and economic systems represented in the Commission or its Working Group would be useful in that it would provide welcome information to users of arbitration world-wide about the difficulties that have emerged in practice and the possible solutions to such difficulties.

6. In considering its future work in this area, the Commission may wish to take note of the fact that the Working Party on International Legal and Commercial Practice of the Economic Commission for Europe (ECE) has been discussing various issues relating to the Convention on International Commercial Arbitration (Geneva, 1961), including its possible revision. While no decision has yet been made as to whether the Convention should be revised, or the thrust of any revision, the ideas tentatively discussed include the possibility of a revision that would increase the utility of the Convention for existing and potential new signatories. In view of the potential universal interest of the discussions in the ECE Working Party, and in view of the connection between those discussions and any future work in the area of arbitration to be decided by the Commission, the Commission may wish to request the Secretariat to follow closely the considerations in the ECE Working Party and report about those considerations to the Commission or its Working Group.

7. Should the Commission decide to include on its work programme any of the issues mentioned in this document or any issue raised at the session of the Commission, it may wish to request the Secretariat to prepare studies, in cooperation with relevant international organizations, and perhaps to prepare first tentative proposals for consideration by the Commission or one of its Working Groups.

II. POSSIBLE TOPICS FOR CONSIDERATION BY THE COMMISSION

A. **Conciliation**

8. The term "conciliation" is used here to refer to proceedings in which an independent and impartial person is assisting parties in dispute to reach a settlement. Conciliation differs from negotiations between the parties (which typically take place after a dispute has arisen) in that a conciliation is conducted by a third independent and impartial person, whereas in settlement negotiations between the parties no such third independent and impartial person is involved. The difference between conciliation and arbitration is that conciliation is purely voluntary in that both parties participate in it only to the extent that, and as long as, they both so agree. Thus, a conciliation ends either in a settlement of the dispute or it ends unsuccessfully, whereas the arbitral tribunal, if there is no settlement, imposes a binding decision on the parties.

9. Conciliation proceedings in the above sense are envisaged and dealt with in a number of rules of arbitral institutions, as well as in the UNCITRAL Conciliation Rules (1980). These Rules are widely

used and have served as a model for many other sets of conciliation rules. In practice, such conciliation proceedings are referred to by various expressions, including "mediation".

10. Conciliation is being increasingly practiced in various parts of the world, including regions where until several years ago it was not commonly used. This trend is reflected, inter alia, in the establishment of a number of private and public bodies offering conciliation services to interested parties. This trend, and a growing desire in different regions of the world to promote conciliation as a method of dispute settlement, has given rise to discussions calling for internationally harmonized legal solutions designed to facilitate conciliation. Ideas raised in such discussions are summarized below.

1. Admissibility of certain evidence in subsequent judicial or arbitral proceedings

11. In conciliation proceedings, the parties typically express suggestions and views regarding proposals for a possible settlement, make admissions or indicate their willingness to settle. If, despite such efforts, the conciliation does not result in a settlement and the parties initiate judicial or arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. This possibility may discourage parties from actively trying to reach a settlement during conciliation proceedings, which may greatly reduce the usefulness of conciliation.

12. In order to address the above problem, the UNCITRAL Conciliation Rules contain a rule in article 20, which reads as follows:

> "The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:
>
> (a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
>
> (b) Admissions made by the other party in the course of the conciliation proceedings;
>
> (c) Proposals made by the conciliator;
>
> (d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

13. If the parties use no conciliation rules or use rules that do not contain a provision such as article 20 of the UNCITRAL Conciliation Rules, under many legal systems the parties may be affected by the above-described problem. Even if the parties have agreed on a rule such as the one contained in article 20, it may not be certain that the agreement concerning evidence will be given full effect. In order to assist the parties in such situations, some jurisdictions have adopted laws designed to prevent the introduction of certain evidence relating to previous conciliation proceedings into subsequent judicial or arbitral proceedings.

2. Role of conciliator in other adversary proceedings

14. A party may be reluctant to actively strive for a settlement in conciliation proceedings if it has to take into account the possibility that, if the conciliation is not successful, the conciliator might be appointed as counsel of the other party or as an arbitrator. The conciliator's awareness of certain facts occurring during conciliation (e.g. proposals for settlement and admissions) might prove to be prejudicial for the party who made them. This is the reason behind the provision of article 19 of the UNCITRAL Conciliation Rules, which reads as follows:

"The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings."

15. Some jurisdictions have included similar provisions in their legislation. In some cases, however, prior knowledge on the part of the arbitrator might be regarded by the parties as advantageous (in particular because that knowledge will allow the arbitrator to conduct the case more efficiently); in such cases, the parties may actually prefer that the conciliator be appointed as an arbitrator in the subsequent arbitral proceedings. In order to overcome any objection based on assertions of prejudice in those cases, some jurisdictions have adopted laws expressly allowing a conciliator, subject to agreement of the parties, to serve as an arbitrator.

3. Enforceability of settlement agreements

16. One of the major potential disadvantages of conciliation is the possibility that the time and money spent for the conciliation will be in vain if the parties do not reach a settlement. It has often been said that the attractiveness of conciliation would be greatly increased if a settlement reached during a conciliation would have executory force so that a party to the settlement would not be compelled to litigate in order to achieve what has been agreed upon. Admittedly, obtaining an executory title in court proceedings would likely be less protracted if the claim is based on a settlement as compared to the case where there has been none. Nevertheless, the prospect of litigation in order to enforce a settlement reduces the attractiveness of conciliation.

17. A possible way of obtaining an executory title would be for the parties who have reached a settlement to appoint the conciliator as an arbitrator and limit the arbitration proceedings to recording the settlement in the form of an arbitral award on agreed terms (as provided for, e.g., in art. 34(1) of the UNCITRAL Arbitration Rules (1976)). A possible obstacle to this approach, however, may arise in a number of legal systems in which, once a settlement has been reached and the dispute has thereby been eliminated, it is not possible to institute arbitral proceedings.

18. In light of the above, some jurisdictions have adopted laws that establish the enforceability of settlement agreements reached in conciliation proceedings. Such laws provide, for example, that the written settlement agreement should, for the purposes of its enforcement, be treated as an arbitral award and may be enforced as such. Another possible solution may be for legislation to expressly permit the parties to the settlement, despite the disappearance of the dispute, to commence arbitration and obtain from the arbitrator (who may be the former conciliator) an award on agreed terms.

4. Conclusion

19. The Commission may wish to consider whether, with a view to encouraging and facilitating conciliation, it would be useful for it to consider preparing harmonized legislative model provisions that would deal with questions such as the admissibility of evidence submitted during conciliation in subsequent arbitration or court proceedings; any role that a conciliator might play in subsequent arbitral proceedings; and the conditions under which a settlement reached during conciliation proceedings may be treated as an executory title.

B. Requirement of written form for arbitration agreement

20. Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states as follows:

> "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985) provides that:

> "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

21. Problems arising from the requirement that arbitration agreements be in written form have often been described as difficult and frustrating. It is at the stage of recognition or denial of an effective agreement to arbitrate that tensions can still be seen between the courts and the arbitral process. It has also been said that the harmonization of interpretation of article II(2) of the Convention should have priority for a better functioning of the Convention. However, before discussing this issue, this note will consider first the issue of the requirement of "written form" for an arbitration agreement and its compatibility with the increased use of electronic commerce.

1. Arbitration agreement "in writing" and electronic commerce

22. The question as to whether electronic commerce is an acceptable means of concluding valid arbitration agreements should pose no more problems than have been created by the increased use of telex and telecopy or facsimile. The above-cited article 7(2) of the UNCITRAL Model Law expressly validates the use of any means of telecommunication "which provides a record of the agreement", a wording which would cover most common uses of electronic mail or electronic data interchange (EDI) messaging.

23. As to the New York Convention, it is generally accepted that the expression in article II(2) "contained in an exchange of letters or telegrams" should be interpreted broadly to include other means of communication, particularly telex (to which facsimile could nowadays be added). The same teleological interpretation [3] could be extended to cover electronic commerce. Such an extension would also be in line with the decision taken by the Commission when it adopted the UNCITRAL Model Law on Electronic Commerce together with its Guide to Enactment in 1996.[4] However, further study might be needed to determine whether interpretation of article II(2) of the New York Convention by reference to either the UNCITRAL Model Law on Arbitration or the UNCITRAL Model Law on Electronic Commerce would be likely to gain wide international consensus and should be recommended by the Commission as a workable solution in respect of this issue and also for dealing with the more general issues of form requirements.[5]

2. "Exchange of letters or telegrams" as form requirement

24. The problem arises from the combination of the question of form and the way the arbitration agreement comes about (i.e. its formation), expressed by the expression "exchange of letters or telegrams", which is found both in the Convention and in the Model Law. This expression lends itself to an overly literal interpretation in the sense of a mutual exchange of writings. A tacit acceptance would be, in principle, not sufficient. Neither would be a purely oral agreement.

25. Fact situations that have posed serious problems under the Convention, and require at least very extensive, teleological interpretation of the Model Law include the following: tacit or oral

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[3] For example, the Swiss Federal Tribunal observed that "[article II(2)] must be interpreted in the light of [the Model Law], whose authors wished to adapt the legal regime of the New York Convention to current needs, without modifying [the actual Convention]". Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company) S.A., 16 January 1995, 1st civil division of Swiss Federal Tribunal; relevant excerpts in (1995) 13 Association suisse de l'arbitrage, Bulletin, pp. 503-511, at p. 508.

[4] The Guide to Enactment (which was drafted with the New York Convention and other international instruments in mind) provides that "the Model Law [on Electronic Commerce] may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law [on Electronic Commerce] as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved." (see Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, para. 6).

[5] This question raises more general concerns regarding the compatibility of electronic commerce with the legal regime established by a series of international conventions that contain mandatory requirements for the use of written documents. An inventory of such instruments was prepared by the United Nations Economic Commission for Europe (Trade/R.1096/Rev.1), together with a recommendation that work might be undertaken by UNCITRAL to identify possible solutions to those concerns.

acceptance of a written purchase order or of a written sales confirmation; an orally concluded contract referring to written general conditions (e.g., oral reference to a form of salvage); or, certain brokers' notes, bills of lading and other instruments or contracts transferring rights or obligations to non-signing third parties (i.e., third parties who were not party to the original agreement). Examples of such transfers to third parties include the following: universal transfer of assets (successions, mergers, demergers and acquisitions of companies); specific transfer of assets (transfer of contract or assignment of receivables or debts, novation, subrogation, stipulation in favour of a third party (*stipulation pour autrui*)); or, in the case of multiple parties, or groups of contracts or groups of companies, implicit extension of the application of the arbitration agreement to persons who were not expressly parties thereto.[6]

26. Courts have reached rather disparate decisions in those situations, often reflective of their general attitude towards arbitration. In the great majority of cases, they have been able to hold the parties to their agreement. However, under existing case law, it has been noted, for example, that an arbitration clause in a sales or purchase confirmation will meet the written form requirement of article II(2) of the Convention only if: (a) the confirmation is signed by both parties; or (b) a duplicate is returned, whether signed or not; or possibly (c) the confirmation is subsequently accepted by means of another communication in writing from the party who received the confirmation to the party who dispatched it. Conditions such as these are no longer in accord with international trade practice.

27. Various means of solving the above-mentioned problems might be envisaged at the legislative level. One possible solution, on which the Commission might wish to request further study, would rely on the UNCITRAL Model Law on Arbitration as a tool for interpreting the New York Convention. Such a solution might require possible amendments or additions to the current text of the Model Law; should it be amended, a range of alternative approaches might be considered.

28. One possible approach, in line with recent legislative developments in a number of countries, would be to include a list of instruments or factual situations where arbitration agreements would be validated despite the lack of an exchange of documents. Such a list might include, for example, the use of bills of lading or other instruments and situations listed above.

29. A broader solution would be to validate arbitration agreements entered into in the absence of an exchange of documents where the applicable law did not impose any form requirement on the main contract. Language might be considered along the lines of a proposal made during the preparation of article 7(2) of the Model Law as follows: "An arbitration agreement also exists when one party to a contract refers in its written offer, counter-offer or contract confirmation to general conditions, or uses a contract form or standard contract, containing an arbitration clause and the other party does not object, provided that the applicable law recognizes formation of contracts in such manner".[7]

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[6] J.-L. Delvolvé, "Third parties and the arbitration agreement", in Proceedings of the New York Convention Day Colloquium, supra note 1.

[7] Doc. A/CN.9/WG.II/WP.37 (1982), draft article 3.

That proposal had been rejected "since it raised difficult problems of interpretation."[8] However, in support of such an approach, it has been suggested on several occasions, as well as at the "New York Convention Day" in 1998, that article 7(2) should be amended so as to widen the definition of writing (for example to cover situations when parties conclude a contract on the basis of one party's standard conditions with an arbitration clause that is not signed by one party nor is there any exchange of documents which could bring the arbitration clause within the definition of writing).[9] It might be objected that there may be specific reasons why a party would wish to refuse a specific provision, particularly a stipulation as important as a waiver of the right to go to court. However, that objection might sufficiently be taken care of through the possibility granted to the refusing party to object to the arbitration clause. In order to find a suitable rule for universal use, more discussion and study is needed of proposals made during the preparation of the Model Law and especially of the various solutions developed in recent national laws.

30. The most radical solution might be to amend the Model Law to establish total freedom with respect to the form of the arbitration agreement. Such freedom would even validate oral arbitration agreements. It might be objected, however, that allowing oral agreements would lead to uncertainty and litigation.

31. The solution of relying on a possibly amended version of the Model Law as a tool for interpreting article II(2) of the New York Convention (without amending or revising that Convention) might not bring about a sufficient level of certainty and uniformity, particularly as regards oral agreements, which courts would, in all likelihood, be reluctant to accept in a number of countries. A second solution could be to rely on the more-favourable-law provision of article VII of the Convention. That solution could be pursued only if article II(2) were no longer to be interpreted as a uniform rule establishing the minimum requirement of writing but would instead be understood as establishing the maximum requirement of form. If article II(2) were to be interpreted as establishing a uniform rule, a reference to article VII for the purpose of alleviating the form requirement would be possible only where the national law provides a full enforcement mechanism since the Convention becomes inapplicable in toto.[10] In that case, possible additions to the Model Law might need to include express provisions for recognition and enforcement of arbitral awards based on agreements meeting the more liberal form requirement - a solution which would have to be dealt with in the wider context of a possible chapter on enforcement. Further study of the two possible interpretations of article II(2) may be found appropriate by the Commission.

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[8] Doc. A/CN.9/232 (1982), para. 45.

[9] N. Kaplan, "New developments on written form", in Proceedings of the New York Convention Day Colloquium, supra note 1.

[10] A. J. van den Berg, "The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas", in (1996) Association suisse de l'arbitrage, Special Series No. 9, pp. 25-45, at p. 44.

C. **Arbitrability**

32. In some States the commercial subject matters that are reserved to the courts are determined by case law only, while in other States they are determined by various statutes, for instance, those dealing with anti-trust or unfair competition, securities, intellectual property, labour or company law. Various States have included in their arbitration law a general provision going beyond the traditional formula of "what parties may compromise on or dispose of" to cover, for example, "any claim involving an economic interest". Uncertainty about, and differences among definitions of, which disputes are arbitrable may cause considerable difficulties in practice.

33. One way of approaching the problem may be to attempt to reach a world-wide consensus on a list of non-arbitrable issues. If that does not seem feasible, it may be considered whether it would be desirable to agree on a uniform provision setting out three or four issues that are generally considered non-arbitrable and then call upon States to list immediately thereafter any other issues deemed non-arbitrable by that State. Such an approach of channelled information, as used in article 5 of the UNCITRAL Model Law on International Commercial Arbitration, would provide certainty and easy access to information about those restrictions.

34. In searching for the best approach that would be workable world-wide and that would provide the desired degree of certainty and transparency, one would face a dilemma. The more general the formula, the greater would be the potential risk of divergent interpretation by courts of different States; the more detailed the list, the greater would be the risk of non-acceptance by States and, to the extent the list would be accepted, the greater would be the risk of solidifying matters and thus impeding further development towards limiting the realm of non-arbitrability. Nevertheless, a considered attempt seems desirable since the result of a world-wide discussion would in itself be revealing and useful.

D. **Sovereign immunity**

35. When a private party initiates arbitral proceedings against a State, it runs the risk that the State may decline to participate on the grounds of sovereign immunity. Or, the private party may try to seek recognition and enforcement of an arbitral award against the State and encounter the plea of sovereign immunity at that stage. Since arbitration arises out of an agreement, the question to be addressed is whether the State can rely on the defence of sovereign immunity where it has previously entered into an agreement to arbitrate with the other party.

1. Sovereign immunity in arbitral proceedings

(a) International law

36. A review of various international instruments as well as national legislation in many States suggests that a State may enter into a binding arbitration agreement or that agreement by a State to arbitrate international commercial disputes implies waiver of its sovereign immunity.

37. A number of international and regional instruments contain a provision to the effect that States are bound to recognize agreements to arbitrate. For example, the European Convention on

International Commercial Arbitration (Geneva, 1961) provides that in matters to which the Convention applies "legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements" (art. II(1)).

38. Another such instrument is the European Convention on State Immunity, which states in article 12(1):

> "Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:
>
> (a) the validity or interpretation of the arbitration agreement,
>
> (b) the arbitration procedure,
>
> (c) the setting aside of the award, unless the arbitration agreement otherwise provides."[11]

39. Similar provisions are contained in the draft Articles on Jurisdictional Immunities of States and their Property, adopted by the International Law Commission in 1991,[12] and the draft Convention on State Immunity prepared by the International Law Association.[13]

40. It may be noted also that in 1976 the Asian-African Legal Consultative Committee (AALCC) recommended that UNCITRAL consider preparing a protocol to the New York Convention

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[11] Council of Europe, European Convention on State Immunity and Additional Protocol, done at Basle, May 16, 1972.

[12] Report of the International Law Commission on the work of its forty-third session (1991), Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10, Doc. A/46/10. Article 17 states as follows:
"If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure; or

(c) the setting aside of the award;

unless the arbitration agreement otherwise provides."

[13] Reproduced in (1983) 22 International Legal Materials 287. Article III states as follows:
"2. An implied waiver may be made inter alia:
(b) by agreeing in writing to submit a dispute which has arisen, or may arise, to arbitration in the forum State or in a number of States which may include the forum State. In such an instance a foreign State shall not be immune with respect to proceedings in a tribunal of the forum State which relate to:

(i) the constitution or appointment of the arbitral tribunal, or

(ii) the validity, or interpretation of the arbitration agreement or the award, or

(iii) the arbitration procedure, or

(iv) the setting aside of the award."

clarifying, inter alia, that "where a governmental agency is a party to a commercial transaction in which it has entered into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration pursuant to that agreement".[14]

(b) National Laws

41. The first attempts by national legislatures to codify rules on sovereign immunity began in the 1970's and since then several States have enacted foreign sovereign immunity legislation. A few of these laws contain provisions similar to those in the international instruments noted above. In other States, the same result is achieved by providing that a foreign Government enjoys immunity from the courts of the legislating State, subject to certain exceptions; one such exception is where the foreign Government has entered into an arbitration agreement. It has also been legislated that if a party to the arbitration agreement is a State, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement. In yet other States, the rules on sovereign immunity have evolved through case law.

2. Sovereign immunity in enforcement of arbitral awards

(a) International law

42. After having successfully obtained an arbitral award against a State, the claimant may encounter a plea of sovereign immunity by the State when seeking enforcement of the award.

43. As regards the New York Convention, which provides for a general obligation to recognize as binding foreign arbitral awards, some commentators are of the view that the text and *travaux preparatoires* would support the position that a State which has agreed to submit a dispute to arbitration is required to comply with the resulting arbitral award and cannot plead immunity.

44. In the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington, 1965), despite the requirement on the part of States to recognize as binding and to enforce awards rendered pursuant to that Convention, sovereign immunity is specifically preserved. Article 54(1) of the Convention states as follows:

> "(1)Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State ... .

However, article 55 states that:

> "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

45. In the view of some, if the generally accepted principle is that, by entering into an agreement to

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[14] Doc. A/CN.9/127, UNCITRAL Yearbook, vol. VIII:1977, part two, III, Annex, para. 3(c).

arbitrate, a foreign State has waived any right to claim sovereign immunity, then it should follow that such waiver extends also to the enforcement of the arbitral award. It is noted that otherwise there would be little point in applying the waiver principle to engage in arbitral proceedings, if the State against which the award is made can later avoid enforcement proceedings by yet another plea of sovereign immunity. Others argue that refusal by a foreign State to honour an arbitral award constitutes a separate act by the State, so that sovereign immunity can be raised again, or possibly for the first time, as a defence to the enforcement proceedings.

46. Most national legal systems distinguish between waiver of immunity from jurisdiction and waiver of immunity from execution. As a consequence, in some cases, agreement by a State to submit to arbitration may not be sufficient to imply consent to the jurisdiction of the court in the State where enforcement is being sought, nor to imply consent to execution. The requirement for express consent is set out in articles 7 and 18(2) of the International Law Commission's draft Articles on Jurisdictional Immunities of States and their Property. What these draft provisions clarify is that waiver of sovereign immunity will be considered to have been made if the State has given its consent to the jurisdiction and its consent to execution.[15]

47. Another basis for the exclusion of the sovereign immunity defence from execution proceedings is where the property that is sought to be attached as a result of execution is property that is used in commercial activities by the foreign State. This exception is outlined in the provisions of article 18(1) of the draft Articles of the International Law Commission, which follow below.[16] The draft Articles also specify certain caategories of property that are exempt from attachment.[17]

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[15] Draft article 7 states as follows:

"1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:

(a) by international agreement;

(b) in a written contract; or

(c) by a declaration before the court or by a written communication in a specific proceeding.

"2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State."

Draft article 18(2) states as follows:

"2. Consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint under paragraph 1, for which separate consent shall be necessary."

[16] This exception follows from the general principle that a governmental entity which engages in a commercial activity, as opposed to a governmental activity, is not immune from suit. There are several international instruments that contain provisions to that effect (e.g., art. 7(1) of the European Convention on State Immunity). It is also a common provision in national laws, and there is considerable jurisprudence discussing means for differentiating "governmental activity" from "commercial activity".

[17] The categories that are exempt from attachment as outlined in article 19 include: property used or intended for use for the purposes of the various diplomatic missions of the State, or for military purposes; property of the central bank or similar authority; property forming part of the cultural heritage of the State or part of an exhibition of scientific, cultural or historic interest.

Article 18(1)

"1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measure as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed."

(b) National laws

48. Only a few States have enacted enforcement provisions specific to arbitral awards. For example, in one law it is stated that where the foreign State is a party to an arbitration agreement, that State is not immune in a proceeding for the enforcement of an award made pursuant to the arbitration. Under the law of another State, the plaintiff cannot levy execution to enforce an arbitral award against a foreign State's property unless that State has consented or the property is used or intended for commercial purposes.

49. It is more common for the legislation to address enforcement of judgements of all kinds, without specific reference to arbitral awards. The approach usually follows one of two theories. One is the absolute theory, which prohibits attachment of foreign State property of any kind without consent of that State. The more common and modern approach is based on the restrictive theory, which prohibits attachment under more limited circumstances. There is variation, however, in its application. In some laws, the "State" is defined narrowly, so as to exclude State trading entities or State entities engaged in commercial activities. Most legislation also excludes immunity when the State has given its consent to execution or attachment, and in some laws such consent is construed to cover an implied as well as an express waiver. Some States do not permit enforcement against foreign State property located in the State where enforcement is being sought unless there is a sufficient jurisdictional connection. Other States require a link between the property to be attached and the claim. Most States accept that certain categories of State property must remain non-attachable, similar to the categories outlined in article 19 of the draft Articles of the International Law Commission referred to above.

3. Conclusion

50. Given that the matter of State immunity remains under consideration by the International Law Commission, and given that the General Assembly has decided to establish a working group of the

Sixth Committee to consider outstanding substantive issues related to the Draft Articles of the International Law Commission at its fifty-fourth session, beginning in 1999,[18] the Commission may wish to request the Secretariat to monitor that work and to report on the outcome of those discussions.

E. Consolidation of cases before arbitral tribunals

51. Sometimes it may be desirable to consolidate into one arbitral proceeding two or more arbitral cases based on different arbitration agreements. For the purposes of the present discussion, consideration is being given only to those situations involving possible consolidation of two or more proceedings where the proceedings to be consolidated take place or are to take place in the same State. Although consolidation may also be desirable in some instances where the arbitral proceedings take place in different States, those situations raise additional issues of international cooperation between national courts, which are beyond the scope of the present discussion.

52. Consolidation may be considered desirable in a variety of situations. The most usual situations are those where more than one arbitration arises out of the same set of facts or involves the same parties. One example is where there exists an arbitration agreement between a purchaser of industrial works and its general contractor, and other arbitration agreements exist between the general contractor and its various subcontractors to which the purchaser is not a party. An occurrence that brings about arbitration between one set of parties often precipitates arbitration between the other parties. In such a situation, one or more of the parties may wish these related arbitral proceedings to be joined.

53. One of the advantages of consolidation is avoidance of inconsistent decisions. Where more than one arbitral tribunal deliberates on matters arising out of the same set of facts, it is possible for each tribunal to arrive at a different conclusion. In the example given above, if the parties were to arbitrate separately after a problem in a project under construction, it is conceivable that one tribunal may find that the general contractor is not responsible while another tribunal may find that none of the subcontractors is responsible. Yet, the facts may indicate that the purchaser of the industrial works should be entitled to recover its loss from at least one of the parties. Another possible advantage of consolidation is efficiency. If one arbitration tribunal can hear all of the parties and their expert witnesses, and review all of the evidence, this might avoid duplication, reduce costs and save time for all of those involved.

54. An important difference should be noted between those situations where the parties have agreed upon consolidation, whether in the arbitration agreement or otherwise, and those where they have not. In cases where parties have already agreed, they may require assistance in order to implement the agreement; for example, the terms for consolidation may not have been stipulated, the parties may be unable to agree on the selection of the tribunal, or they may be in a deadlock in respect of other issues. On the other hand, one or more of the parties in this situation may not wish to have the related disputes considered in consolidated proceedings (e.g., in order to maintain confidentiality or for reasons of procedural tactics). It may thus occur that in some cases the multiple parties involved

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[18] Resolution 53/98 by the General Assembly, Convention on Jurisdictional Immunities of States and their Property (20 January 1999).

agree that the different disputes should be considered in consolidated proceedings while in other cases such agreement may not exist.

55. It has been suggested that the objective of legislative efforts should be limited to facilitating implementation of agreements to consolidate cases. Others believe that legislation should go further and authorize courts to order consolidation when, in the view of the court, this appears appropriate even in the absence of agreement between the parties.

1. Current legislative solutions

56. A review of the legislation indicates that the power of a competent authority to order consolidation is not covered by any international instruments relevant to international arbitration. At the time the UNCITRAL Model Law on Arbitration was being drafted, there was general agreement that the Model Law should not deal with problems of consolidation in multi-party disputes. While it was agreed that parties had the freedom to conclude consolidation agreements if they so wished, the Working Group was of the view that there was no real need to include a provision on consolidation in the Model Law.[19]

(a) Authority to compel consolidation without agreement of parties

57. In the reviewed examples of national laws in which consolidation is addressed, only in two cases does the legislation authorize the court to order consolidation, even if not all the parties involved agree that the cases should be consolidated. In one of those States, the authority to compel consolidation applies only to domestic arbitrations; for this authority to apply to international arbitrations, the parties must first have elected by written agreement to "opt-in" to the domestic regime that contains the court-ordered consolidation provisions. In the other State, the parties can by agreement "opt-out" of the provision. After all of the parties and arbitrators have been given an opportunity to express an opinion on a party's request for consolidation, the court may grant the request wholly or partly or reject it. If the proceedings are to be consolidated and the parties cannot agree on the tribunal or the procedural rules, the court is to so decide.

(b) Authority to assist parties in consolidating cases based on agreement of parties

58. The more usual approach among countries that have enacted legislative provisions on consolidation, however, is to support party autonomy and to assist parties that have already agreed to consolidate their proceedings. Most of the legislation requires either that such agreement has to have been expressed in the arbitration agreement or otherwise, or, that the application is to be brought with the consent of all of the parties.

59. Under most of the legislation reviewed, the application for consolidation is to be made to a court. In some jurisdictions, application for consolidation can be made to the arbitral tribunal or tribunals concerned. The requested arbitral tribunals may confer with each other with a view to

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[19] Report of the Working Group on International Contract Practices on the work of its third session (1982), Doc. A/CN.9/216, UNCITRAL Yearbook, vol. VIII:1982, part two, III, A, para. 37.

making consistent orders for consolidation. If an order for consolidation is not made, or if inconsistent provisional orders by the arbitral tribunals involved are made, any party may apply to the court, which will decide on consolidation.

60. Most of the legislation reviewed provides that a consolidation order can be made where there is a common question of law or fact, that the rights to relief claimed arise out of the same transaction or that for some other reason a consolidation order is desirable.

2. Conclusion

61. The Commission may wish to consider whether the question of consolidation of arbitral proceedings is an area that merits further study with a view to the possibility of preparing model legislative provisions. If so, the Secretariat might be requested to explore, in particular, the practical experience with consolidation provisions in national laws and issues such as whether legislative recognition of the enforceability of consolidation agreements is required, whether arbitral tribunals and courts ought to be specifically empowered to facilitate consolidation of related arbitration agreements, with the consent of parties, regarding matters such as the selection of the arbitral tribunal that will continue, the terms of consolidation, and the applicable procedures; and, whether the tribunals involved ought to be specifically empowered to confer with each other on these matters.

F. **Confidentiality of information in arbitral proceedings**

62. Significant international discussion of the issue of confidentiality of arbitral proceedings in recent years, in part sparked by the decision of the High Court of Australia in the case of Esso v Plowman,[20] has led to an appreciation that parties' requirements for the confidentiality of proceedings may not be adequately protected by arbitration rules or by national arbitration laws. Prior to that time, it was generally assumed that if the privacy of arbitration proceedings was protected, such as by the provisions of procedural rules, confidentiality would also be protected. On that basis, confidentiality was not specifically addressed in either arbitral rules or national laws. The UNCITRAL Arbitration Rules, for example, provide that hearings shall be in camera unless the parties agree otherwise and that the award can be made public only with the consent of both parties. The UNCITRAL Model Law on International Commercial Arbitration, on the other hand, does not address either privacy or confidentiality.

63. While ensuring the privacy of proceedings does not necessarily also ensure confidentiality, privacy assists by limiting the number of people who have access to the arbitration hearing. Arbitration rules generally address the issue of privacy of the proceedings. While such rules also increasingly address the issue of confidentiality and the case law of a few jurisdictions specifically recognizes confidentiality as an implied condition of the agreement to arbitrate, confidentiality is not generally addressed in national laws, except in a very few instances. Where confidentiality is

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[20] (1995) 183 Commonwealth Law Reports 10; see also Commonwealth of Australia v Cockatoo Dockyard P/L (1995) 36 New South Wales Law Reports 662.

specifically protected, there is no single approach to the scope of the obligation of confidentiality in terms of the information that is to be treated as confidential, the persons to whom the obligation attaches, or permissible exceptions to prohibitions on disclosure and communication.

1. Current provisions on confidentiality

64. A survey of the arbitration rules and the very few national laws which address confidentiality indicates a variety of approaches. One approach to formulating a confidentiality provision that could apply to all classes of cases has been to include a general provision that material produced for, or generated by, an arbitration cannot be disclosed to third parties without the consent of the other party or leave of the court. Another approach has adopted a more detailed provision which addresses the parameters of the duty of confidentiality including, for example, (i) the material or information that is to be kept confidential; (ii) the persons to whom the duty of confidentiality is to extend and how it is to be applied; and (iii) permissible exceptions to prohibitions on disclosure and communication.

65. In terms of the material or information that is to be kept confidential, some provisions include a general description of "facts or other information relating to the dispute or arbitral proceedings". Other provisions adopt a more particular description of the information to be covered and include various categories of information which are accorded different treatment. These categories include, for example, reference to the evidence given by a party or a witness; written and oral arguments; the fact that the arbitration is taking place; the identity of the arbitrators; the contents of the award; communications between parties themselves or their advisors prior to, or in the course of, the arbitration; and, information that is inherently confidential, such as trade secrets and commercial-in-confidence information.

66. As to the persons to whom the duty of confidentiality is to extend, a range of persons are covered such as the arbitrators; the staff of the arbitration institution, where the arbitration is institutional; parties and their agents; witnesses, including experts; counsel and advisors. Since the duty may not be able to be applied to all of these persons in the same way, one approach requires arbitrators and parties' representatives, and perhaps witnesses, to sign a confidentiality agreement. Another approach regarding witnesses is to require the party calling the witness to guarantee that the witness observes the same degree of confidentiality as that required of the party. Some provisions also deal with the period for which the duty of confidentiality continues to apply.

67. Some of the circumstances in which disclosure of information is permitted have included those where the parties consent to disclosure; where the information is in the public domain; where disclosure is required by law or a regulatory body; where there is a reasonable necessity for the protection of a party's legitimate interests; and, where it is in the interests of justice or in the public interest. While the scope of some of these exceptions may be susceptible of clear definition and application, others, such as disclosure of information "in the public interest", are generally regarded as requiring some careful consideration. It has been suggested, for example, that a balance may need to be struck between a genuine public interest in the information in question and threatened disclosure of commercially sensitive information as a means of putting one party under pressure to settle.

68. Some provisions also deal with special conditions which attach to the disclosure by virtue of the

time at which disclosure occurs. If information is to be disclosed, for example, during the arbitration proceedings, one approach has been to require that notice of the disclosure be given both to the arbitral tribunal and the other party. Where disclosure occurs once the arbitration has concluded, only notice to the other party may be relevant.

69. Notwithstanding provisions protecting confidentiality of the arbitral award, some institutional rules include a provision that allows for aggregated statistics to be published, or even information on individual proceedings to be made available, provided the information disclosed does not enable individual parties or circumstances to be identified. Consent of the institution is a usual requirement.

2. Conclusion

70. On the basis that current protection may not be adequate, opinion is divided on how the confidentiality of arbitral proceedings can be ensured. One approach suggests that the difficulty of defining the scope of a general duty of confidentiality makes it difficult to address the issue at all. Others, including the High Court of Australia in Esso v Plowman, suggest that parties to an arbitration can expressly provide in their arbitration agreement for absolute or specific levels of confidentiality to apply. Yet another approach is to suggest that arbitral rules should include provisions on confidentiality, while a further approach suggests that what might be needed is a model legislative provision. In all of these cases, the emphasis has been placed upon the importance for international commercial arbitration of uniformity of treatment and widespread coverage.

71. The Commission may wish to consider whether the issue of confidentiality needs to be further examined and, in particular, whether further protection may be needed in the form of a model legislative provision. If so, the Secretariat might be requested to explore the options for protecting confidentiality and, in particular, the scope of the protection that may need to be afforded in terms, for example, of the material or information that is to be kept confidential, the persons to whom the duty of confidentiality is to extend and how it is to be applied, and permissible exceptions to prohibitions on disclosure and communication.

G. Raising claims for the purpose of set-off

72. It frequently occurs in arbitral practice that the respondent in an arbitration case, in reacting to the statement of claim, in addition to responding to the particulars of the statement of claim, invokes a claim that the respondent has against the claimant. The respondent may invoke such a claim in two ways. Firstly, it may raise a counter-claim, which is to be treated by the arbitral tribunal essentially in the same manner as if it were an original claimant's demand and is to be decided upon independently of the decision on, and irrespective of the outcome of, the claimant's demand. Thus, for example, if the claimant's demand is dismissed, the arbitral tribunal is still called upon to decide on the counter-claim.

73. Secondly, the respondent may invoke its claim not as a counter-claim but as a defence for the purpose of a set-off. In such a case, the defence, to the extent it is admissible, is to be decided upon only if and to the extent the claimant's demand is founded. If the claimant's demand is unfounded,

there is no need for the arbitral tribunal to consider the claim relied upon for the purpose of a set-off.

74. An issue that often arises in practice is under what conditions may the arbitral tribunal take into consideration a disputed claim relied on for the purpose of a set-off. The question that has given rise to divergent answers and controversy is whether the arbitral tribunal is competent to consider the merits of a claim raised for the purpose of a set-off if the claim is not covered by the arbitration agreement covering the principal claim (but may be covered by a different arbitration agreement or may not be covered by any arbitration agreement).

1. Current solutions

75. The question may be settled by agreement of the parties. There are arbitration rules which allow the arbitral tribunal to consider claims for the purpose of a set-off even if the claim is not covered by the arbitration agreement covering the principal claim. For example, article 27 of the International Arbitration Rules of the Zurich Chamber of Commerce (1989) provides that the arbitral tribunal also has jurisdiction over a set-off defence if the claim that is set off does not fall under the arbitration clause, and even if there exists another arbitration clause or a jurisdiction clause for that claim.

76. The UNCITRAL Arbitration Rules take a more restrictive position in that the respondent may rely on a claim for the purpose of a set-off if the claim arises out of the same contract (art. 19). The Rules do not state expressly that the set-off claim must be covered by the same arbitration agreement as the main claim. If the parties have modelled the arbitration agreement on the model arbitration clause which appears in the footnote to article 1 of the Rules[21] (and have thereby submitted to arbitration the disputes arising out of the contract), both the principal claim and the claim invoked for the purpose of a set-off would be covered by the same arbitration agreement. If, however, the arbitration agreement covering the principal claim does not cover the set-off claim, the question will arise also under the UNCITRAL Arbitration Rules whether the arbitral tribunal has the competence to consider the set-off claim that is not covered by the arbitration agreement.

77. The UNCITRAL Model Law on International Commercial Arbitration does not address the question expressly. The analytical commentary on the draft text of the Model Law, which was prepared by the Secretariat, takes the position that, if the respondent raises a claim for the purpose of a set-off (or as a counter-claim), the claim must not exceed the scope of the arbitration agreement. The commentary adds that this restriction, while not expressed in the article, seems self-evident in view of the fact that the jurisdiction of the arbitral tribunal is based on, and given within the limits of, that agreement.[22]

78. Views have since been expressed that the arbitral tribunal's competence to consider claims by

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[21] The relevant part of the model arbitration clause reads: "Any dispute, controversy or claim arising out of or relating to this contract ... shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force" [emphasis added].

[22] Doc. A/CN.9/264, UNCITRAL Yearbook, vol. XVI:1985, part two, I. B. commentary on draft art. 23, paras. 5 and 8.

way of a set-off should under certain conditions extend beyond the contract from which the principal claim arises. The reasons cited are procedural efficiency and the desirability of eliminating disputes between the parties; such reasons are said to carry weight in particular when both parties are merchants or when the principal claim and the claim invoked for the purpose of a set-off have arisen from economically related contracts.

2. Conclusion

79. The Commission may wish to consider whether the issue merits further study. The questions to be studied may include, for example, the question whether the competence of the arbitral tribunal to deal with claims raised by way of a set-off can appropriately be left to arbitration rules or whether an appropriate legislative rule would be desirable.

H. **Decisions by "truncated" arbitral tribunals**

80. It follows from laws and rules on arbitration that arbitrators, having agreed to act in that capacity, have a right and a duty to participate in the proceedings and the deliberations of the arbitral tribunal and to sign the arbitral award. Such a right and a duty is also implicit or expressly provided for in the agreement by which an arbitrator accepts the appointment.

81. It sometimes happens that an arbitrator, in particular a party-appointed arbitrator, resigns or refuses to participate in the proceedings or the deliberations of the arbitral tribunal. Most national laws and arbitration rules contain provisions addressing that situation. Generally, it is provided that the arbitrator who fails to act is to be replaced by a substitute arbitrator; usually it is provided that the rules governing the appointment of the substitute arbitrator are those applicable to the appointment of the arbitrator being replaced (e.g., art. 14(1) of the UNCITRAL Model Law on International Commercial Arbitration).

82. Irrespective of the reason for resignation or inaction of an arbitrator, an arbitrator's failure to act and the appointment of a substitute arbitrator is likely to cause delay, costs and inconvenience. One notable reason for considerable additional cost and delay is the possible need for repeating the hearings that were held before the substitute appointment (see, e.g., art. 14 of the UNCITRAL Arbitration Rules).

83. Particularly problematic are cases where resignation of an arbitrator or refusal to cooperate occurs at a late stage of the proceedings and the grounds therefor are seen by the other two arbitrators, or by the arbitral institution administering the case, as lacking justification. Because of the potential disruption to arbitral proceedings, a source of special concern are cases where resignation or refusal to cooperate occurs as a result of collusion between a party and the arbitrator appointed by that party. Such collusion may be motivated by a desire to cause delay, thwart the proceedings, and thereby deprive the other party of its legitimate rights under the arbitration agreement.

84. Failure to act by the arbitrator may give rise to liability of the arbitrator for breach of his or her contractual or statutory duties. Such liability is an issue between the aggrieved party and the arbitrator and falls outside the dispute that is being considered within the arbitration in which the

failure to act has occurred. If the issue results in a dispute, it would normally be decided by a court unless there is an arbitration agreement between the arbitrator and the party pursuing the claim against the arbitrator.

85. Notwithstanding such liability of the arbitrator, the arbitrator's failure to participate may also be dealt with in the context of the arbitral proceedings in which the arbitrator ceases to participate. As a rule, there is little difficulty caused where the refusal to cooperate occurs after the arbitral tribunal has concluded its deliberations on the substance of the award and the failure to cooperate is limited to the arbitrator's refusal to sign the award. The solution that is generally accepted in laws and arbitration rules is that the signature of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated (art. 31(1) of the UNCITRAL Model Law; a similar rule is contained, for instance, in art. 32(4) of the UNCITRAL Arbitration Rules).

86. The question that has in recent years given rise to lively discussions among practitioners is whether - when an arbitrator resigns late in the proceedings, perhaps after evidence has been taken and arguments heard - the two remaining arbitrators are permitted to complete the proceedings and render an award.[23] Such decisions by the two remaining arbitrators are often referred to as "truncated tribunal" decisions.

87. In the discussions of this issue, an assessment that has been frequently expressed is that in both civil law and common law countries courts would respect awards by truncated tribunals if the parties had agreed to that procedure. In addition, it has been said that prudent parties who wish to avoid difficulties will therefore choose rules that permit two arbitrators to continue the proceedings and render an award, in the absence of the third, when the majority determines that it is in the interest of fair and orderly arbitration to do so. A view has also been expressed that it would be hard to imagine that, even in the absence of an express rule or agreement, a modern court in a State that otherwise has a public policy of supporting international commercial arbitration would invalidate an award issued by a majority of the arbitrators because a party-appointed arbitrator, in an effort to frustrate the arbitration, chose to absent himself at a late stage of the proceedings, or refused to participate in deliberations or to sign an award. This view is based on the assumption that national laws that refer to participation by three arbitrators should be interpreted as having been satisfied when all three have had a fair and equal opportunity to participate. It has also been suggested that, as a practical matter, once it is made clear that a party-appointed arbitrator cannot succeed in preventing the issuance of an award by absenting himself or herself from the proceedings or the deliberations, the underlying problem is likely to disappear.[24] Differing views have also been expressed cautioning against a statutory authorization for a truncated tribunal to decide in its discretion. Arguments have been advanced that a party should not be responsible for misbehaviour of the arbitrator appointed by that party, and that a discretionary right to proceed as a truncated tribunal might be problematic when, after an arbitrator resigns, the other two arbitrators act

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[23] For example, the Xth International Arbitration Congress, Stockholm, 28-31 May 1990. Proceedings of the Congress: ICCA Congress Series No. 5. International Council for Commercial Arbitration. I. Preventing delay and disruption of arbitration, II. Effective proceedings in construction cases. General Editor Albert Jan van den Berg, p. 26.

[24] Ibid., pp. 28 and 29.

improperly in the interest of one of the parties.

1. Current non-legislative and legislative solutions

88. In light of these discussions, some arbitral institutions have adopted rules that determine the conditions under which a truncated tribunal may validly proceed and make an award. For example, the International Arbitration Rules of the American Arbitration Association (1991) provide in article 11:

> "1. If an arbitrator on a three-person tribunal fails to participate in the arbitration, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such nonparticipation, and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agree.
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> "2. If a substitute arbitrator is appointed, the tribunal shall determine at its sole discretion whether all or part of any prior hearings shall be repeated."

89. Provisions of essentially the same import have been incorporated into other sets of international arbitration rules, such as, for example, The Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between two Parties of which only one is a State (1993), (art. 13(3)) and the World Intellectual Property Organization (WIPO) Arbitration Rules (1994), (art. 32).

90. The issue has been addressed by few national laws on arbitration. One approach has been to include in legislation the substance of the above-described solutions in arbitration rules. Another approach has been more restrictive: while in principle the law recognizes the freedom of the parties to agree on how decisions by truncated tribunals are to be dealt with, it restricts the possibility of the parties to grant the remaining arbitrators permission to proceed without the non-cooperating arbitrator to those cases where the arbitrator refuses to take part in the vote on a decision. It is further provided that the parties are to be given advance notice of the intention to make an award without the arbitrator who refuses to participate in the vote. In the case of other decisions, the law provides that the parties need only be informed, subsequent to the decision, of the arbitrator's refusal to participate in the vote.

2. Conclusion

91. The Commission may wish to discuss the potential detrimental consequences of bad-faith withdrawals of arbitrators from arbitral proceedings on the practice of international commercial arbitration and, in that context, it may consider questions such as: (a) the extent to which the parties should be able by agreement to put beyond doubt the validity of an award issued by a truncated

tribunal; (b) whether it would be desirable for the Commission to formulate a model solution for an agreement of the parties on decisions by truncated tribunals; and (c) whether it would be desirable for laws on international commercial arbitration to deal with the issue and, if so, whether a model legislative solution should be prepared by the Commission. If the Commission should decide that the issue should be further considered, it may wish to request the Secretariat to prepare a study in which it would set out various possible solutions for consideration by the Commission.

I. Liability of arbitrators

92. In preparatory work for the UNCITRAL Model Law on International Commercial Arbitration, there was general agreement that the liability of arbitrators could not appropriately be included in the Model Law.[25]

93. National arbitration laws, including a number of laws enacting the Model Law, have added provisions dealing with liability of the arbitrator. These provisions differ on whether arbitrators should be immune from professional liability and on the parameters of the immunity. There is a tendency amongst common law jurisdictions to equate arbitrators with judges and extend an equivalent immunity, and amongst civil law jurisdictions to focus on arbitrators' contractual function as experts. Nevertheless, there is considerable diversity even within the same legal families, and no clear line of distinction can be drawn between the approaches taken by each.

1. Current legislative provisions

94. A number of national arbitration laws, including some enacting the Model Law, include provisions dealing with immunity of arbitrators, but there are considerable variations in the scope and extent of the immunity. Many of the countries which have adopted specific provisions in the arbitration laws which give effect to the Model Law are common law jurisdictions.

95. Some of the provisions included in these laws exclude liability for any act or omission in connection with the arbitration, except where the act or omission is shown to have been in bad faith, or done dishonestly, or where there has been conscious and deliberate wrongdoing. Another approach is to provide that the arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator; in some cases an exception is added for cases where there has been fraud or malice. In one instance, an arbitrator is not liable for any mistake in law, fact or procedure made in the course of the arbitral proceedings or in the making of the arbitral award. Some laws adopt the opposite approach of not seeking to limit liability, but specifying that an arbitrator may be liable for losses incurred by reason of delay or failure to comply with the arbitrator's obligations.

96. The parties to whom the exclusion may apply varies widely. In some cases, the immunity applies only to the liability of the arbitrator, while in others, this immunity is extended to employees

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[25] Report of the Working Group on International Contract Practices on the work of its third session (1982), Doc. A/CN.9/216, UNCITRAL Yearbook, vol. XIII 1982, part two, III, A, paras. 51-52.

and agents of the arbitrator and to advisers of the arbitrators and to experts. Other laws further extend the immunity to those who may be involved in appointing an arbitral tribunal and those who may carry out administrative tasks in connection with the arbitration proceedings, as well as to their employees and agents. The terms of the exceptions to immunity, in all of these laws, are the same for arbitrators and the extended classes of persons.

97. In other jurisdictions, principally civil law jurisdictions, the contractual nature of the service performed by the arbitrator is emphasized and the arbitrator would be liable for failure to fulfil the terms of the reference. This would include failure to perform with reasonable diligence; failure to make the award within the contractual or legal time limit; putting the parties at the risk of the award being annulled; bias; negligence; breach of secrecy of the arbitral proceedings; as well as every instance of fraud, misrepresentation, corruption and gross negligence. In some jurisdictions, the making of the award attracts particular immunity because of the quasi-judicial nature of the function being performed. In some cases, liability can be limited in the contract between the arbitrator and the parties to the arbitration, although this may not exclude liability for gross negligence or wilful misconduct.

98. In some common law jurisdictions, arbitrators may enjoy a high level of immunity more akin to a judge, while in others a distinction is drawn between those acts of an arbitrator which are adjudicatory, and thus entitled to this high standard of immunity, and those acts which are unrelated to any adjudicatory function and thus subject to civil liability.

2. Conclusion

99. There are considerable differences between arbitration laws and rules in their treatment of the issue of liability, and the extent of civil liability of arbitrators may vary according to a number of factors, such as (a) the choice of procedural rules governing the proceedings; (b) the law governing the contract between the arbitrator and the parties; (c) the nationality of the arbitrators; and (d) and the place where the proceedings are conducted. Given these issues, any treatment of the question of the liability of arbitrators is likely to require careful consideration.

100. Since a universally acceptable formula may assist the process of arbitration, and provide greater certainty for both arbitrators and arbitrating parties, the Commission may wish to consider whether the question of liability needs to be further examined. In considering the need for further treatment of liability of arbitrators, it may be useful to review in detail the manner in which the issue is currently treated, as well as proposals made by organizations or commentators.

J. Power by the arbitral tribunal to award interest

101. Providing an explicit authorization for the arbitrator to award interest was not considered during the preparation of the UNCITRAL Model Law on International Commercial Arbitration. Since that time, uncertainty in some jurisdictions as to the power of arbitrators to award interest has spread, particularly in the common law world, and a number of jurisdictions have added specific provisions dealing with the power to award interest to laws adopting the Model Law.

1. Current legislative solutions

102. The provisions dealing with the power to award interest which have been adopted in national laws vary greatly in scope, particularly as regards the level of detail and the issues included. At its simplest, the legislation authorizes the tribunal to award interest, except where the parties have agreed otherwise.

103. Some jurisdictions go beyond the basic power and address other matters. In terms of the sum which may attract interest, some laws limit this to the amount of the award, which might be specified as including interest and costs. Another approach is to provide that the arbitral tribunal may order interest to be paid on the whole or any part of the award. In other cases, a distinction may be drawn, in terms of the sum upon which interest is payable, between money awarded by the tribunal in the proceedings and money claimed in, and outstanding at the commencement of the proceedings, but paid before the award is made. Some jurisdictions limit the application of the interest provision and specify, for example, that it does not authorize the arbitrator to award interest on interest, and does not apply in relation to any amount upon which interest is payable as of right, whether by virtue of an agreement or otherwise.

104. A number of laws address the time from which interest may be awarded. One approach limits this to the period commencing from the date of the award, while other laws provide that interest also may be awarded for the whole or any part of the period between the date the cause of action arises and the date of the award, while a further approach provides for interest from the date of the award to the date of payment of the award. Some laws also include the times at which interest should be paid.

105. As to the rate of interest, a number of laws leave it up to the tribunal to determine a reasonable rate or reasonable commercial rate. Other laws specify that the rate should be the same rate as that applying to a judgment or, in some cases, a particular rate is fixed. A more elaborate rule provides that the rate of interest should be "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment".[26]

2. Conclusion

106. The Commission may wish to consider whether the question of the power of the arbitral tribunal to award interest is one which merits further study with a view to preparing a model legislative provision. In that context, it may also consider whether such further study should cover any of the details of the power as illustrated by the enactments referred to above, including (a) the sum upon which interest may be charged; (b) the period for which interest is payable, both before and after the award is made; (c) the type (simple or compound) and the rate of interest to be applied; and (d) other issues such as the time at which interest is to be paid.

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[26] UNIDROIT Principles of International Commercial Contracts (UPICC), Article 7.4.9.

K. Costs of arbitral proceedings

107. In preparatory work for the UNCITRAL Model Law on International Commercial Arbitration, there was wide support for the view that questions concerning the fees and costs of arbitration were not appropriate matters to be dealt with in a model law. It was left open for States to provide for court control concerning fees and costs and, for example, to allow for readjustment of utterly unreasonable fees.[27] Since completion of the Model Law, however, a number of Model Law enactments have added provisions on the arbitral tribunal's power to fix and allocate costs and fees. These laws often differ in substance and particularly as to the detail of the power and the scope of related issues.

1. Current legislative provisions

(a) What may be included as "costs"

108. Legislation adopting the Model Law is varied as to what is included within the meaning of "costs". Some laws adopt a general description, referring simply to the "costs of the arbitration", and may include a reference to the fees and expenses of the arbitrator or arbitrators or to those costs incurred by the parties and necessary for the proper pursuit of their claim or defence. Other laws adopt a more comprehensive approach, specifying the items to be included, such as (a) fees of the arbitrator and tribunal; (b) costs of accommodation, travel and administrative support during the arbitration proceedings; (c) costs of evidence, both factual and expert; (d) costs of legal advice and representation; and (e) other expenses incurred in connection with the arbitration.

(b) Apportionment and liability for costs

109. Laws enacting the Model Law generally provide that the arbitral tribunal has the discretion to decide which of the parties is to pay the costs of the arbitration and in what proportions, taking into account what is reasonable in the circumstances of the case. However, there are variations. Some laws distinguish between fees and expenses of the arbitrator and other costs of the arbitration, stipulating that the parties are jointly and severally liable for payment of the arbitrators' fees and expenses. Other laws provide a default rule that, where costs are not dealt with in the award and there is no additional award addressing the costs of arbitration, each party is responsible for its own legal and other expenses and for an equal share of the fees and expenses of the tribunal. One law directly addresses the situation where there is an offer of settlement which is rejected. If the settlement offer reflects the final award of the tribunal, the tribunal is authorized to take this into account when awarding costs and expenses.

(c) Related issues

110. Court review and assistance - A number of laws deal with aspects of court review and assistance, authorizing the courts to adjust arbitrators' fees and expenses, including ordering

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[27] Report of the Working Group on International Contract Practices on the work of its third session (1982). Doc. A/CN.9/216.UNCITRAL Yearbook, vol. XIII:1982, part two, III.A, para.99.

repayment of excessive amounts; and to determine recoverable costs, including fees and expenses of the arbitral tribunal, where the arbitral tribunal does not do so or where a party does not consent to the tribunal making that determination.

111. Incomplete awards - Some laws provide that where the award does not provide for payment of costs of the arbitration, parties may apply to the arbitral tribunal or, in some cases, the court, for a determination as to costs.

112. Limitation of recoverable costs - In some jurisdictions, parties are free to agree what costs of the arbitration are recoverable or they may to apply to the tribunal or court to make such a determination. In addition, the arbitral tribunal may be authorized to limit recoverable costs to a specified amount, subject to possible variations.

113. Interpretation or correction costs - A number of laws stipulate that the arbitral tribunal may not charge additional fees for interpretation, correction or completion of its award.

2. Conclusion

114. The Commission may wish to consider whether the power to award costs is sufficiently covered by arbitration rules or national laws or whether the conduct of international commercial arbitration would be facilitated by providing a uniform rule. In that context, the Commission might wish to consider the scope of such a rule and whether, in addition to the power to award costs, additional issues as indicated above should be covered.

L. Enforceability of interim measures of protection

115. According to many sets of arbitration rules, an arbitral tribunal may, at the request of a party, order interim measures intended to preserve the status quo until the arbitral award is made. Such measures are referred to by expressions such as "interim measures of protection", "provisional orders", "interim awards", "conservatory measures" or "preliminary injunctive measures". For example, article 26(1) of the UNCITRAL Arbitration Rules provides as follows:

> "At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods."

116. Interim measures of protection, often not defined in rules providing for their issuance, can encompass a wide variety of measures including: orders for not removing goods or assets from a place or jurisdiction; preserving evidence; selling goods; and, posting a monetary guarantee. An interim measure may be imposed for the duration of the arbitration or it may be of a more temporary nature and expected to be modified as matters evolve. The measure may be in the form of an order by the arbitral tribunal or in the form of an interim "award".

117. The question often discussed by practitioners is the enforceability of such measures, both in

the State where the arbitration is taking place and in other States. The need for enforceability is usually supported by the argument that a final award may be of little value to the successful party if, in the meantime, action or inaction on the part of a recalcitrant party has rendered the outcome of the proceedings largely useless (e.g., by dissipating assets or removing them from the jurisdiction). It has been noted that, therefore, an interim order can be at least as or even more important than an award.[28]

118. There are, however, also views querying whether interim measures issued by the arbitral tribunal should be enforceable. It has been said that, as a practical matter, parties tend to comply with such measures anyway, for example, in order to avoid responsibility for costs caused by the failure to implement the measure, or because they are reluctant to displease the arbitral tribunal. In addition, if interim measures are treated as executory titles, there would be a need to apply to them provisions (the same as or similar to those governing the setting aside of arbitral awards) designed to cure certain serious violations of procedure, which would overly formalize the process. However, in response, it has been said that there are many cases where the party refuses to comply with the interim measure without regard to the potential adverse consequences, such as responsibility for costs. Furthermore, the provisions on judicial enforcement of interim measures, including the prerogatives of the court in the enforcement process, may reflect the interim nature of the measures and do not necessarily have to be the same as the rules governing the enforceability of final awards.

119. Some propose that arbitrating parties in need of interim measures should resort to the judicial process, as is possible under many national laws. However, in response, it is pointed out that this may pose certain difficulties. For example, obtaining a measure may be a lengthy process, in particular, because the court may require arguments on the issue or because the court decision is open to appeal. Furthermore, the courts of the place of arbitration may not have effective jurisdiction over the parties or the assets, since arbitrations are often conducted in a "neutral" territory that has little or nothing to do with the subject-matter in dispute, a court in another jurisdiction may have to be approached with a request to consider and issue a measure. Moreover, in some jurisdictions a party may not be able to request the court to issue an interim measure of protection on the ground that the parties, by concluding an arbitration agreement, are deemed to have excluded the courts from intervening in the dispute.

120. It is therefore argued that resources would be used more efficiently if parties were able to make their requests for enforceable interim measures directly to the arbitral tribunal, rather than to the court, as the tribunal is already familiar with the case and is usually more technically apprised of the subject-matter.

1. Current legislative solutions

(a) New York Convention

121. Sometimes arbitral tribunals issue interim measures of protection in the form of interim awards. Such a possibility is expressly envisaged, for example, in article 26(2) of the UNCITRAL

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[28] V. V. Veeder, "Provisional and conservatory measures", in Proceedings of the New York Convention Day Colloquium, supra note 1.

Arbitration Rules. This raises the question whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards covers also such interim awards. As the Convention does not define the term "award", it is not clear whether the Convention applies to interim awards as well. The prevailing view, confirmed also by case law in some States, appears to be that the Convention does not apply to interim awards.

(b) UNCITRAL Model Law

122. The UNCITRAL Model Law on International Commercial Arbitration expressly deals in article 17 with the power of the arbitral tribunal to order such interim measure of protection as it may consider necessary and also to require a party to provide appropriate security in connection with such measure. The Model Law, however, is silent on the matter of enforcement.

123. When during the preparation of the Model Law the substance of article 17 was considered by the Working Group, it contained a sentence that "if enforcement of any such interim measure becomes necessary, the arbitral tribunal may request [a competent court][the Court specified in article V] to render executory assistance".[29] Under one view in the Working Group, executory assistance by courts was considered desirable and should be available. Under another view, which the Working Group adopted after deliberation, the sentence was to be deleted since it dealt in an incomplete manner with a question of national procedural law and court competence and was unlikely to be accepted by many States. It was understood by the Working Group, however, that the deletion of the sentence should not be read as a preclusion of executory assistance in those cases where a State was prepared to render such assistance under its procedural law.[30]

(c) National laws

124. In respect of enforceability of interim measures issued by an arbitral tribunal, a variety of approaches have been taken by legislatures. In many States the legislation is silent on this point. In others, including some of those that have incorporated article 17 of the Model Law empowering the arbitral tribunal to order interim measures of protection, there are express provisions for enforcement of those interim measures. For example, in one case a clause has been added so that the court may, at the request of a party, permit enforcement of the interim measure ordered by the tribunal, unless application for a corresponding interim measure has already been made to a court. In a few States, the legislation stipulates that the provisions modelled on chapter VIII of the Model Law on recognition and enforcement of awards (arts. 35 and 36) apply also to orders made under the provision modelled on article 17 of the Model Law.

125. As regards the powers that have been granted to the court enforcing an interim measure issued by the arbitral tribunal, a variety of approaches can also be noted. In at least one State, it is provided that the court may review the basis of the interim order made by the tribunal. In a few other cases, it is stated that the court is to give preclusive effect to the findings of fact made by the tribunal. In one country, the law provides that the court may recast the order issued by the arbitral

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[29] Report of the Working Group on International Contract Practices on the work of its sixth session (1983), Doc. A/CN.9/245, UNCITRAL Yearbook, vol XV:1984, part two, II, A, 1, para. 70.

[30] Ibid., para 72.

tribunal if necessary for the purpose of enforcing the measure; in addition the court may, upon request, repeal or amend its decision to permit enforcement.

126. One of the concerns with respect to court-ordered enforcement of measures issued by an arbitral tribunal may be the liability where there has been an abuse of rights. For such a case, it has been provided in one national law, for example, that if a measure ordered by the arbitral tribunal proves to have been unjustified from the outset, the party who obtained its enforcement is obliged to compensate the other party for damage resulting from the enforcement of such measure. It is further provided that such a claim for compensation may be put forward in the pending arbitral proceedings.

2. Conclusion

127. The Commission may wish to consider whether the question of enforceability of interim measures of protection ordered by an arbitral tribunal should be further studied by the Secretariat. The Secretariat might be requested to explore the relevant practice in international commercial arbitration and court practice, and, with regard to the desirability and feasibility of uniform legislative provisions, to present first tentative solutions for consideration by the Commission.

M. **Discretion to enforce an award that has been set aside in the State of origin**

128. After an arbitral award is made, the claimant may seek enforcement of the award either before the courts in the State where the award was made ("State of origin") or before the courts in another State where the debtor has assets ("State of enforcement"). Where, however, the award is set aside (or "annulled" or "vacated") by the competent court in the State of origin, the enforcement of the award in the State of origin would not be possible. The party seeking enforcement may then try to have the award enforced by a court in another State. The issue that faces the court in the State of enforcement is whether there are any circumstances that allow the court to enforce the award, disregarding the fact that the award has been set aside in the State of origin.

1. Current legislative solutions

(a) New York Convention

129. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides a list of grounds on which enforcement of an arbitral award may be refused. One of those is where "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" (art. V(1)(e)).

130. What has been under discussion among practitioners and in academic circles is whether, and the degree to which, such refusal to enforce based on article V(1)(e) of the Convention is discretionary. Discussions have centered around whether the court in the State of enforcement has authority to take into consideration the grounds on which the original award was set aside, or, whether the request for enforcement must necessarily be refused.

131. Some of the discussion has been precipitated by the language of article V(1). It has been said that use of the words "enforcement ... may be refused" implies some discretion on the part of the competent authority to refuse enforcement. However, it has also been said that, when read together with the word "only" (i.e. "enforcement ... may be refused ... only if ..."), a different interpretation may be derived. Consequently, it is said to be unclear whether enforcement is to be refused in every case where an award has been set aside.

132. It has been said that article VII(1) of the Convention may also provide an option for enforcement that avoids taking into account the decision to set aside the award.[31] Under what is referred to as the "more-favourable-right" provision, a party may seek enforcement of a foreign arbitral award in a State on the basis of other treaties or the domestic law of that State. Without having to comment on the merits of the decision to set aside by the court in the State of origin, the court in the State of enforcement would be able to determine that, on the basis of its own domestic law, the award should be enforced. One of the criticisms of this approach, however, is that if States are thereby encouraged to adopt individualized criteria for the enforcement of foreign arbitral awards, this will defeat the objectives of harmonization and unification of domestic laws.

(b) 1961 European Convention

133. Enforcement of awards that have been set aside has also been addressed in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX(1), if an award has been set aside by a court in the State of origin, this shall constitute a ground for the refusal of enforcement by the court in another State only if the reasons for the setting aside are among those outlined; these are essentially the same as the grounds given in article V(1)(a) through (d) of the New York Convention.[32] Therefore, under the European Convention, the court in the State of

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[31] The provisions of article VII(1) of the Convention are as follows:

"1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

[32] The provisions of article IX(1) of the European Convention are as follows:

"1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:

(a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

(b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from

enforcement is bound to enforce the award, if it was set aside in the State of origin on grounds other than those in article IX(1) of the European Convention. Furthermore, article IX(2) limits application of article V(1)(e) of the New York Convention, as follows:

> "In relations between Contracting States that are also parties to the [New York Convention], paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above."

(c) UNCITRAL Model Law

134. Article 36(1) of the UNCITRAL Model Law provides the grounds for refusing recognition or enforcement of an arbitral award, which are essentially the same as the provisions in article V(1) of the New York Convention; in particular, article 36(1)(v) includes the provision that enforcement of the award may be refused if the "award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made".

135. Article 34(2) of the Model Law provides the grounds on which an arbitral award may be set aside; the first four of the grounds (in art. 34(2)(a)(i) to (iv)) parallel the first four grounds for refusing recognition and enforcement (in art. 36 (1)(a)(i) to (iv), modelled on article V(1)(a) to (d) of the New York Convention). Article 34(2)(b) also provides that an arbitral award may be set aside if the court finds that (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State of origin or (ii) the award is in conflict with the public policy of the State of origin.

(d) Policy considerations

136. In light of recent case law, a more general discussion has developed as to whether, as a matter of principle, the setting aside of an award in the State of origin should be an absolute bar to its enforcement in another State. Some of the arguments advanced in the discussion are summarized below.

137. "The award no longer exists" According to one theory, an award that has been set aside is no longer in existence and therefore cannot be enforced in any other jurisdiction. This theory, however, has been criticized on the grounds that the existence of an award - as an expression of a contract between the parties - cannot be assumed to be a matter for the exclusive determination by the courts in the State where it was rendered. The criticism follows the approach common to most questions that involve a conflict of laws; if a forum properly establishes jurisdiction, a matter can be determined as valid in accordance with the laws of that forum despite lacking validity under the laws of another.

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those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

138. "Convention not to be circumvented" If the Convention is interpreted so that an award that has been set aside by a competent authority in the State of origin cannot be enforced anywhere else, some fear that the intentions of the Convention would be circumvented. It has been said that one of the purposes of the Convention is to liberate the international arbitral process from domination by the law of the place of arbitration. If the choice of the place of arbitration affects the ultimate outcome due to certain grounds for setting aside that are peculiar to that place, then this goal cannot be met. It is possible to envision a situation where an award is set aside for reasons that are unusual or egregious. A party whose award has been so set aside would be deprived of any remedy to have this situation rectified if such an award could not be enforced elsewhere. Some argue that to interpret article V(1)(e) so as to absolutely prevent enforcement of awards set aside in the State of origin may result in the enforcement of foreign awards having been made even more difficult than in the absence of the Convention.

139. "Excessive court interference to be avoided" Another argument, which, however, could be used by either side of the debate, is that excessive court interference in arbitration should be avoided. This could support the position that the decision to set aside the award in the State of origin should not be revisited by a second court in the State of enforcement. On the other hand, it could also support the position that, where there has been excessive interference by the court in the State of origin, the court in the State of enforcement should be enabled to disregard that decision and enforce the award.

140. "Forum shopping" It has been suggested that if the courts of jurisdictions other than that of the place of arbitration are able to decide on a discretionary basis as to whether to refuse enforcement of an award set aside by the court in the State of origin, it may encourage parties to seek out those jurisdictions where the likelihood of enforcement is known to be more favourable. This may also lead to the situation where the party in whose favour the arbitral award was made can seek enforcement of that award in as many countries as will exercise jurisdiction, thereby putting the other party to the expense of defending against enforcement, without end. In other words, it would be impossible for a party against whom an award was unjustly made and which ought to be set aside on internationally recognized grounds, to obtain an annulment valid world-wide.

141. "Res judicata; need to avoid inconsistent results" The court in the State where enforcement is sought may be reluctant to comment upon whether the award ought or ought not to have been set aside by the court in the State of origin. This reluctance is considered beneficial for maintaining mutual respect for the authority of the judiciary. It is also pointed out that an interpretation of the Convention that permits the court in the State of enforcement discretion to refuse to enforce the award results in double judicial control. The question of enforcement of the arbitral award has already been determined by the court in the State of origin; enabling a second court to revisit this decision means that a matter which has already been settled by one court will be re-litigated in another forum. This, it is argued, is contrary to basic principles of law and the resultant inefficiency does not serve well the interests of international commercial arbitration. Some also express the concern that encouraging the court in the State of enforcement to revisit the grounds for setting aside may lead to inconsistent judicial decisions. One type of inconsistency would arise where an award set aside, and as a result regarded as inexistent in one jurisdiction, would be enforced in another jurisdiction. Another, more complex, type of inconsistency may arise when, after the award

has been set aside in the State of origin but enforced in another State, a reconstituted arbitral tribunal in the State of origin issues an award that is essentially different from the first award and this second award is then presented for enforcement in the State where the first award has been enforced. The court in the State of enforcement would thus be faced with requests to enforce opposing awards. Although such a case may be rare, it has occurred in practice.

142. "Expectation of the parties not to be circumvented". Parties that have agreed on the State in which the arbitral proceeding are to take place can presume to have, by their own choice, elected to be subject to the laws of that particular forum; accordingly, it is argued, to enable the courts of another State to disregard a setting aside order by a court in the State of origin would circumvent the will of the parties. Some even suggest that the parties may have deliberately chosen the place of arbitration where awards are susceptible to being set aside on grounds particular to that jurisdiction and may have an expectation that such decisions will not be disregarded by the courts of another State. Others consider it to be much more likely that the parties to an arbitral award will not have anticipated the forum-specific or egregious grounds for setting aside the award.

143. "Redundancy of article V(1)(e)". It has been suggested that the reasons for setting aside should be categorized according to whether they are in conformity with internationally accepted standards. The intention is to differentiate between "international standards" and "local standards".[8] International standards would comprise those consistent with paragraphs (a) through (d) of article V(1) of the Convention and article 34(2)(a) of the UNCITRAL Model Law. Under this proposal, only setting aside decisions based on an international standard would constitute grounds to refuse enforcement of foreign arbitral awards; setting aside based on any other ground would not preclude enforcement of the award in another jurisdiction. This approach, it is argued, upholds the intentions of the Convention by allowing an arbitral award to be enforced anywhere, unless that award has been legitimately set aside on internationally recognized grounds. In response, it has been pointed out that if the only grounds for a refusal to enforce an award that has been set aside is whether the award was set aside for reasons that are internationally accepted, then subparagraph (e) is thereby made redundant. It is argued that, as this result could not have been the intention of the Convention, paragraph (e) must provide a separate reason for the courts of the State of enforcement to refuse a request to enforce an award that has already been set aside.

C. Conclusion

144. The Commission may wish to consider whether international commercial arbitration would be facilitated by an undertaking that would seek to clarify the circumstances, if any, under which an arbitral award that has been set aside by a court in the State of origin can be enforced in another State.

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[8] Ian Paulsson, "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment" (USA)", The ICC International Court of Arbitration Bulletin, Vol. 9, No. 1 (May 1998).